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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 411

YVETTE J. MADSEN, PETITIONER,

vs.

NINA KINSELLA, WARDEN OF THE U. S. REFORMATORY FOR WOMEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI—FILED JULY 26, 1951

CERTIORARI GRANTED NOVEMBER 5, 1951

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6220

YVETTE J. MADSEN, *Appellant*,

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

APPENDIX TO APPELLANT'S AND APPELLEE'S BRIEFS

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6220

YVETTE J. MADSEN, *Appellant*,

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

APPENDIX TO APPELLANT'S AND APPELLEE'S BRIEFS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent*.

H. C. No. 1095

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Yvette J. Madsen by her attorneys, Joseph S. Robinson of New York City, Dayton M. Harrington and James D. Graham of Washington, D. C., and

Carl J. Nutter of Charleston, West Virginia, upon information and belief, respectfully shows:

1. That petitioner, Yvette J. Madsen, is a citizen of the United States and a resident of the Borough of Brooklyn, City and State of New York; that she was the wife of Lieutenant Andrew E. Madsen, now deceased, and is the mother of two infant children; that in or about the month of November 1947, petitioner and her husband entered the American Zone of Occupied Germany as a part of the Military Forces of the United States maintained in that area; that after their arrival, petitioner and her husband were granted facilities and billets reserved exclusively for the Occupation Forces; that petitioner's status as a person accompanying the Armies of the United States without the territorial jurisdiction of the United States had not changed up to the time of her arrest hereinafter referred to.

2. That while residing in the American Zone of Occupied Germany as hereinabove set forth, and on or about October 20, 1949, petitioner was arrested by the Air Force Military Police and charged with a violation of the German criminal law before a so-called United States Military Government Court. The said Court, sometimes referred to as an Occupation Court, was neither authorized, created, nor established pursuant to any provision of the Constitution or laws of the United States, but by military fiat without the sanction of law and was wholly devoid of jurisdiction over the person of the accused and the offense charged, and said Court was without power to invoke the provisions of German law against a citizen of the United States, particularly a person accompanying and serving with the Armed Forces of the United States, and said Court was in fact functioning in violation of the express mandate of the Congress of the United States, i.e., Article of War II and other provisions of Federal Law as well as the Constitution of the United States.

3. That thereafter and in the month of February 1950, petitioner was brought to trial before a different court, one which called itself "The United States Court for the Allied High Commission for Germany, 4th Judicial District," which Court was sought to be established by the State Department or Executive Branch of the Government of the United States in violation of the Constitution and laws of the United States, and which Court, like the one referred to in Paragraph 2 hereinabove, was also devoid of jurisdiction over the person of petitioner and the offense charged and was without power to try a citizen of the United States who was accompanying the Armed Forces of the United States in an occupied territory for an alleged violation of German law, and the proceedings against petitioner instituted in one court and carried on in the other were illegal, void and of no effect.

4. That no charges were ever filed against petitioner in said "The United States Court for the Allied High Commission for Germany, 4th Judicial District," a tribunal whose asserted jurisdiction is alleged to stem from sources different from the United States Military Government Courts; nor was any indictment ever filed against petitioner in said court and, in fact, the proceedings against her in said tribunal, before, during and after the trial, were conducted in contravention of the express mandates of the Constitution and laws of the United States and without regard to due process of law under the American Judicial system.

5. That on or about March 18, 1950, the three civilians who composed the so-called United States Court for the Allied High Commission for Germany, in a proceeding brought not in the name of the Sovereign power of the United States, but in the name of the "Office of the United States High Commissioner for Germany against Yvette J. Madsen," and charging a violation of Paragraph 211 of the German Criminal Code, entered an

order directing that petitioner be imprisoned for a term of fifteen years at Alderson, West Virginia, or "elsewhere as the Secretary of the Army may direct." Such order was a nullity because it violates both the Constitution and laws of the United States and because it was signed and entered by persons who were without power to act and who were never properly appointed United States Judges with the approval of the United States Senate as required by law, and the said civilians acting ostensibly as judges assumed criminal jurisdiction over an American citizen accompanying the Armed Forces of the United States although in law and in fact no jurisdiction, such as they sought to exercise, was ever legally vested in them. It is pursuant to the order of said civilians, who function either under the Department of State or under the Department of Defense but not under and as a part of the United States Judiciary, that petitioner was ordered held in confinement.

6. Pursuant to procedure established in the so-called Allied High Commission Courts and to exhaust all remedies available to petitioner, even though the exhaustion of such remedies constituted an empty formality, an appeal was taken to a tribunal called The Court of Appeals for the Allied High Commission, which tribunal, like those referred to in Paragraphs 3, 4 and 5 above, was devoid of jurisdiction over the person of petitioner and the subject matter and was without power to make any legal adjudication of the life or liberty of petitioner or to declare that she be held in custody or who shall hold her in custody; and the persons who composed said tribunal lacked power and jurisdiction to make any adjudication respecting petitioner or to direct her confinement in a United States institution as punishment for crime, and respondent herein may not restrain the liberty of petitioner on the order of a tribunal not created, sanctioned or authorized by the Constitution and laws of the United States; and the order of the so-called Court of Appeals

for the Allied High Commission dated 12 May 1950 is null, void and of no effect, and the restraint of petitioner, which is being carried out by respondent, is illegal.

7. Respondent herein named is the warden of the Federal Reformatory for Women located at Alderson, West Virginia, and holds petitioner in custody on the basis of the orders and alleged adjudications of the tribunals referred to in the preceding paragraphs, and said respondent is vested with the power and duty to take such action with respect to petitioner as this Honorable Court may direct.

8. That the acts of the persons composing the tribunals hereinabove referred to in directing that petitioner be confined, and the acts of respondent in restraining the personal liberty of petitioner in compliance with such orders, are in violation of the Constitution and laws of the United States, and the bringing of petitioner to trial as hereinabove alleged and invoking four different systems of law in one proceeding, namely, German law, U. S. Federal law, U. S. Military law, and a body of self-ordained rules, and denying to her the safeguards and protection guaranteed her by the Constitution and laws of the United States, and seeking to make her amenable to the substantive laws of a foreign jurisdiction, i.e., the German Criminal Code, was improper and unlawful, and the imprisonment and restraint of petitioner is therefore illegal.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue, or in the alternative that a rule to show cause why a writ of habeas corpus should not issue, be granted, directed to respondent named herein, and commanding that she have the body of Yvette J. Madsen, together with the cause of her imprisonment and restraint, brought forth before the United States District Court for the Southern District of West Virginia, or a judge thereof; and it is further prayed that your peti-

tioner be granted such other, further, and equitable relief as this Court may deem just and proper.

JAMES D. GRAHAM, JR.

DISTRICT OF COLUMBIA) ss.:

James D. Graham, Jr., being duly sworn, deposes and says: That he is one of the attorneys for petitioner herein; that he has read and signed the foregoing petition and that he knows the contents thereof; that all matters therein contained are true, except those matters stated on information and belief, and that such matters he believes to be true.

JAMES D. GRAHAM, JR.

Sworn to and subscribed before me
this 16th day of June, 1950.

Anna E. Hess
Notary Public, D. C.

Joseph S. Robinson,
745 Fifth Avenue,
New York 22, New York.

Dayton M. Harrington
James D. Graham, Jr.,
454 Washington Building,
Washington 5, D. C.

Carl J. Nutter,
Box 553,
Charleston 22, West Virginia.
Telephone 2-4134

Attorneys for the petitioner.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent.*

Upon Habeas Corpus No. 1095

ANSWER OF THE RESPONDENT, WHOSE CORRECT DESIGNATION IS "NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN", TO THE ORDER ENTERED HEREIN ON JUNE 26, 1950, REQUIRING HER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT ISSUE.

Respondent, for answer to said order, says that the writ of habeas corpus prayed for in the petition lodged in connection with this matter in the office of the Clerk of this court should not be issued and that the petition should be dismissed for the following reasons:

First: Petitioner has failed to apply for relief by motion to the court which sentenced her, as required by 28 U.S.C., Sec. 2255.

Second: The allegations of the petition do not make out a prima facie case for the issuance of the writ or for the release of the petitioner from custody.

Third: The allegations of the petition are not true in the particulars hereinafter mentioned, to-wit:

(1) It is not true, as alleged in Paragraph 2 of the petition, that said United States Military Government Court was neither authorized, created, nor established pursuant to any provision of the Constitution or laws of the United States, but by military fiat without the sanction of law.

(2) It is not true, as alleged in Paragraph 3 of the petition, that petitioner was brought to trial before a

different court from the court wherein she was charged with a violation of the German criminal law.

(3) It is not true, as alleged in Paragraph 4 of the petition, that no charges were ever filed against petitioner in said "The United States Court for the Allied High Commission for Germany, 4th Judicial District."

(4) It is not true, as alleged in Paragraph 4 of the petition, that the proceedings against petitioner in the United States Court for the Allied High Commission for Germany, 4th Judicial District, were conducted in contravention of the express mandates of the Constitution and laws of the United States, and without regard to due process of law under the American judicial system.

(5) It is not true, as alleged in Paragraph 5 of the petition, that no jurisdiction in law and in fact was ever legally vested in said the United States Court for the Allied High Commission for Germany, 4th Judicial District, to exercise criminal jurisdiction over an American citizen accompanying the armed forces of the United States.

(6) It is not true, as alleged in Paragraph 8 of the petition, that the acts of the persons composing the tribunals referred to in directing that petitioner be confined, or that the acts of respondent in restraining the personal liberty of petitioner in compliance with such orders, are in violation of the Constitution and laws of the United States; nor is it true, as in said paragraph alleged, that the bringing of petitioner to trial, as alleged in the petition, was improper and unlawful, or that the imprisonment and restraint of petitioner is therefore illegal. Also, it is not true, as alleged in said Paragraph 8, that four different systems of law were invoked, namely, the German law, United States Federal law, United States Military law, and a body of

self ordained rules, or that petitioner was denied the safeguards and protection guaranteed her by the Constitution and laws of the United States, or that it was improper and unlawful to seek to make her amenable to the substantive laws of a foreign jurisdiction, i.e., the German Criminal Code.

Respondent says further that it has not been possible, because of lack of sufficient time since entry of the order to show cause, to obtain a certified copy of the transcript of the proceedings in connection with petitioner's arrest, trial and sentence, but that steps have been taken to obtain a certified transcript of such proceedings for the purpose of attaching it to the return to the writ of habeas corpus should the court be of the opinion to and direct the issuance of such writ.

Although respondent is advised that the court will take judicial notice of many of the matters hereinafter set forth, neverthless in order to make a more understandable and complete answer to said order to show cause, respondent says that the pertinent facts and law in connection with petitioner's arrest, arraignment, trial, sentence, appeal and imprisonment are those hereinafter set forth.

The Country of Germany surrendered in World War II on the 8th day of May, 1945. On the 5th day of June, 1945, the United States of America, United Kingdom, France and the Union of Soviet Socialist Republics assumed supreme authority with reference to Germany to be exercised each in its own zone of occupation.

On the 6th day of June, 1949, the President of the United States, by Executive Order No. 10062, reciting the authority vested in him by the the Constitution and the statutes, including the Foreign Service Act of 1946, and as President of the United States and Commander in Chief of the Armed Forces of the United States, es-

tablished the position of United States High Commissioner for Germany, who should be the supreme United States authority in Germany and who should have authority under the immediate supervision of the Secretary of State, subject to consultation with and ultimate direction by the President, to exercise all the governmental functions of the United States in Germany, other than the command of troops.

By ordinances, Nos. 31 and 32 (14 Federal Register 124), filed on January 10, 1949, and in effect without change at the time of the offense charged against petitioner and at the time of petitioner's subsequent arrest, arraignment, trial, conviction, appeal and imprisonment, except as to the change of name hereinafter referred to, the Adjutant General of the United States established a system of courts for the United States Area of Control in Germany, comprising certain territory which included Buschlag, Germany, and detailed the procedure to be followed in such courts. The courts were designated United States Military Government Courts for Germany. The ordinances provided for eleven judicial districts, with a district court for each district, and provided that the district court, with three judges, or with two judges and one magistrate sitting, might decide any civil or criminal case and impose any lawful sentence, including death, provided that when the accused was charged with an offense under the German law, the court should be limited to the sentence or other penal provisions of such law.

The district courts (Ordinance No. 31, (g), Article 7) were given jurisdiction over all persons in the United States Area of Control, except persons, *other than civilians,* who were subject to military, naval or air force law and were serving with any forces of the United States. They were given jurisdiction of various criminal offenses, among them offenses under German law in force in the judicial district of the particular court.

If petitioner should be considered a person subject to military law and, therefore, within the provisions of said Article that no person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander in Chief, European Command, attention is directed to the fact that the following general authorization was issued by the Commander in Chief, European Command, under date of December 11, 1948:

> "Headquarters, European Command, Berlin, Office of the Commander-in-Chief, APO 742, US Army, 11 December 1948
>
> "To: Chief Attorney, United States Military Government Courts for Germany, APO, 696-A, US Army
>
> "Authorization is hereby given for trial of any dependent of a member of the United States Armed Forces or of any dependent of a civilian employee of the Department of the Army for any non-military offense before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters had directed trial by Court Martial.
>
> "BY COMMAND OF GENERAL CLAY:
>
> "G. H. GARDE
> "Lieutenant Colonel, AGC
> Assistant Adjutant General"

These ordinances, set forth in full in 14 Federal Register 124, provided a complete and exhaustive set of rules for the commencement of, and procedure in, criminal proceedings. These rules were substantially identical with the rules relating to criminal trials in the United States District Courts in the United States, except there was no requirement of indictment or trial by jury.

By proclamation of December 28, 1949, made by the United States High Commissioner for Germany, the name of the courts set up by the ordinances mentioned, and which were therein designated United States Military Courts for Germany, was changed to the "United States Courts of the Allied High Commission for Germany", and said courts were adopted and continued by said United States High Commissioner for Germany.

On, and preceding, October 20, 1949, petitioner was the dependent wife of Andrew E. Madsen, and resided with him at Buschlag, Germany, in the United States Zone of Occupation, which was also known as the United States Area of Control. Said Andrew E. Madsen was an Air Force Lieutenant with the Occupation Forces of the United States, stationed at Buschlag, Germany. Petitioner had no connection whatever with the Occupation Forces, or with any other department or instrumentality, of the United States. She was not serving with any forces of the United Nations. On the 20th day of October, 1949, she shot and killed said Andrew E. Madsen at their residence in Buschlag.

She was arrested on or about the 20th day of October, 1949, at Buchweg, Buschlag, Germany, by Air Force Military Police of the United States Occupation Forces in Germany, charged with violation of Section 211, German Criminal Code, in that she did, at Buschlag, Germany, on or about 20 October 1949, unlawfully, intentionally and with premeditation, in a treacherous manner, shoot one Andrew E. Madsen, a human being, in the body with a pistol, as a result of which the aforesaid Andrew E. Madsen died on 20 October 1949.

Section 211 of the German Criminal Code, at that time, read as follows (translated):

> "211. (As amended 4 September 1949, RGBI I, 549). The murderer shall be punished by death.

"A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust):

"For the satisfaction of sexual desire;

"For cupidity (Habgier) or any other base motives:

"In a treacherous or cruel manner or by means causing common danger, or

"In order to make possible or to conceal another offense.

"If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed."

Promptly following her arrest, petitioner was taken before the United States Government Military Court within whose territorial jurisdiction Buschlag, Germany lay, being the court referred to in the petition, and was there arraigned upon the aforementioned charge. She denied the facts and the court accordingly entered for her a plea of not guilty and an additional plea of not guilty by reason of insanity at the time of the commission of the offense charged.

Petitioner was tried in said court on said charge, the name of the court having, in the meantime, been changed, as hereinbefore stated, to United States Court of the Allied High Commission for Germany, and on the 18th day of March, 1950, she was convicted by said court and sentenced to imprisonment for a term of fifteen years. This sentence was within the maximum penalty provided by Section 211 of the German Criminal Code, said section providing for the death penalty or in exceptional cases, life imprisonment.

Thereafter, on March 21, 1950, petitioner filed an appeal to the Court of Appeals, United States Courts of the Allied High Commission for Germany, at Nurnberg, Ger-

many, and her sentence of imprisonment was confirmed by said court on the 12th day of May, 1950. Her imprisonment in the Federal Reformatory for Women, at Alderson, West Virginia, United States of America, followed, in conformity with said judgment.

During all of the court proceedings referred to, she was fully represented by counsel and all such court proceedings were in accordance with the rules and regulations applicable to said courts.

Respondent, therefore, prays that the writ of habeas corpus be denied and that the said petition be dismissed.

NINA KINSELLA
Warden, Federal
Reformatory for Women
Respondent

A. GARNETT THOMPSON
United States Attorney,
Southern District of
West Virginia
Counsel for Respondent

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS:

Nina Kinsella, of full age, being first duly sworn, deposes and says that she is the respondent named in the foregoing answer, that she has read the said answer, and that the facts and matters therein set forth are true to the best of respondent's knowledge and belief.

NINA KINSELLA

Sworn to and subscribed before me this 14th day of July, 1950.

Notary Public for Kanawha
County, West Virginia.

My commission expires_____.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent.*

Upon Habeas Corpus

No. 1095

RETURN OF THE RESPONDENT, WHOSE CORRECT DESIGNATION IS "NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN", TO THE WRIT OF HABEAS CORPUS ISSUED IN THE ABOVE-ENTITLED MATTER ON JULY 14, 1950.

Respondent, Nina Kinsella, Warden of the Federal Reformatory for Women, says that the writ of habeas corpus should be dismissed and the petitioner remanded to custody for the following reasons.

First: Petitioner has failed to apply for relief by motion to the court which sentenced her, as required by 28 U.S.C., Sec. 2255.

Second: The allegations of the petition do not make out a case for the issuance of the writ or for the release of the petitioner from custody.

Third: The allegations of the petition are not true in the particulars hereinafter mentioned, to-wit:

(1) It is not true, as alleged in Paragraph 2 of the petition, that said United States Military Government Court was neither authorized, created, nor established pursuant to any provision of the Constitution or laws of the United States, but by military fiat without the sanction of law.

(2) It is not true, as alleged in Paragraph 3 of the petition, that petitioner was brought to trial before a

different court from the court wherein she was charged with a violation of the German criminal law.

(3) It is not true, as alleged in Paragraph 4 of the petition, that no charges were ever filed against petitioner in said "The United States Court for the Allied High Commission for Germany, 4th Judicial District."

(4) It is not true, as alleged in Paragraph 4 of the petition, that the proceedings against petitioner in the United States Court for the Allied High Commission for Germany, 4th Judicial District, were conducted in contravention of the express mandates of the Constitution and laws of the United States, and without regard to due process of law under the American judicial system.

(5) It is not true, as alleged in Paragraph 5 of the petition, that no jurisdiction in law and in fact was ever legally vested in said the United States Court for the Allied High Commission for Germany, 4th Judicial District, to exercise criminal jurisdiction over an American citizen accompanying the armed forces of the United States.

(6) It is not true, as alleged in Paragraph 8 of the petition, that the acts of the persons composing the tribunals referred to in directing that petitioner be confined, or that the acts of respondent in restraining the personal liberty of petitioner in compliance with such orders, are in violation of the Constitution and laws of the United States; nor is it true, as in said paragraph alleged, that the bringing of petitioner to trial, as alleged in the petition, was improper and unlawful, or that the imprisonment and restraint of petitioner is therefore illegal. Also, it is not true, as alleged in said Paragraph 8, that four different systems of law were invoked, namely, the German law, United States Federal law, United States Military law, and a

body of self ordained rules, or that petitioner was denied the safeguards and protection guaranteed her by the Constitution and laws of the United States, or that it was improper and unlawful to seek to make her amenable to the substantive laws of a foreign jurisdiction, i.e., the German Criminal Code.

Fourth: The true cause of the detention of petitioner is as follows:

Germany surrendered in World War II on the 8th day of May, 1945. On the 5th day of June, 1945, the United States of America, the United Kingdom, France and the Union of Soviet Socialist Republics assumed supreme authority with reference to Germany. For the purpose of military occupation, the German territory was divided into four zones. The President of the United States, by virtue of his authority under the Constitution and as Commander-in-Chief of the Armed Forces of the United States designated as the Commander-in-Chief of the American forces of occupation the person in whom the supreme authority to be exercised by the United States in its zone of occupation would be vested.

On the 6th day of June, 1949, the President of the United States by Executive Order No. 10062, reciting the authority vested in him by the Constitution and the statutes, including the Foreign Service Act of 1946, and as President of the United States and Commander-in-Chief of the Armed Forces of the United States, established the position of United States High Commissioner for Germany. The High Commissioner was vested with supreme authority in the United States zone of occupation and the power, under the immediate supervision of the Secretary of State, subject to consultation with and ultimate direction by the President, to exercise all the functions incident to the government of the United States zone of occupation, other than the command of troops.

By ordinances, Nos. 31 and 32 (14 Federal Register 124), filed on January 10, 1949, and in effect without change at the time of the offense charged against petitioner and at the time of petitioner's subsequent arrest, arraignment, trial, conviction, appeal and imprisonment, except as to the change of name hereinafter referred to, there was established, as directed by the Commander-in-Chief of occupation forces who was vested with authority for the government of the United States Zone, a system of courts for the United States Area of Control, comprising certain territory which included Buschlag, Germany, and detailed the procedure to be followed in such courts. The courts were designated United States Military Government Courts for Germany. The ordinances provided for eleven judicial districts, with a district court for each district, and provided that the district court, with three judges or with two judges and one magistrate sitting, might decide any civil or criminal case and impose any lawful sentence, including death, except that when the accused was charged with an offense under the German law, the court should be limited to the sentence or other penal provisions of such law.

The district courts (Ordinance No. 31, (g), Article 7) were given jurisdiction over all persons in the United States Area of Control, except persons, *other than civilians*, who were subject to military, naval or air force law and were serving with any forces of the United States. They were given jurisdiction of various criminal offenses, among them offenses under German law in force in the judicial district of the particular court.

If petitioner should be considered a person subject to military law and, therefore, within the provisions of said Article that no person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command, attention is directed to the fact

that the following general authorization was issued by the Commander-in-Chief, European Command, under date of December 11, 1948:

> "Headquarters, European Command, Berlin, Office of the Commander-in-Chief, APO 742 US Army, 11 December 1948
>
> "To: Chief, Attorney, United States Military Government Courts for Germany, APO 696-A US Army
>
> "Authorization is hereby given for trial of any dependent of a member of the United States Armed Forces or of any dependent of a civilian employee of the Department of the Army for any non-military offense before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters had directed trial by Court Martial.
>
> "BY COMMAND OF GENERAL CLAY:
>
> "G. H. GARDE
> "Lieutenant Colonel, AGC
> Assistant Adjutant General"

These ordinances, set forth in full in 14 Federal Register 124, provided a complete and exhaustive set of rules for the commencement of, and procedure in, criminal proceedings. These rules were substantially identical with the rules relating to criminal trials in the United States District Courts in the United States, except there was no requirement of indictment or trial by jury.

By proclamation of December 28, 1949, the United States High Commissioner for Germany, as authority responsible for the government of the United States zone of occupation, changed the names of the courts set up by the ordinances mentioned, which were therein designated United States Military Courts for Germany, to the

"United States Courts of the Allied High Commission for Germany", and said courts were adopted and continued by said United States High Commissioner for Germany.

On, and preceding, October 20, 1949, petitioner was the dependent wife of Andrew E. Madsen, and resided with him at Buschlag, Germany, in the United States Zone of Occupation, which was also known as the United States Area of Control. Said Andrew E. Madsen was an Air Force Lieutenant with the Occupation Forces of the United States, stationed at Buschlag, Germany. Petitioner had no connection whatever with the Occupation Forces, or with any other department or instrumentality, of the United States. She was not serving with any forces of the United Nations. On the 20th day of October, 1949, she shot and killed said Andrew E. Madsen at their residence in Buschlag.

She was arrested on or about the 20th day of October, 1949, at Buchweg, Buschlag, Germany, by Air Force Military Police of the United States Occupation Forces in Germany, charged with violation of Section 211, German Criminal Code, in that she did, at Buschlag, Germany, on or about 20 October 1949, unlawfully, intentionally and with premeditation, in a treacherous manner, shoot one Andrew E. Madsen, a human being, in the body with a pistol, as a result of which the aforesaid Andrew E. Madsen died on 20 October 1949.

Section 211 of the German Criminal Code, at that time, read as follows (translated):

> "211., (As amended 4 September 1949, RGBl I, 549). The murderer shall be punished by death.
>
> "A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust):
>
> "For the satisfaction of sexual desire;

"For cupidity (Habgier) or any other base motives;

"In a treacherous or cruel manner or by means causing common danger, or

"In order to make possible or to conceal another offense.

"If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed."

Promptly following her arrest, petitioner was taken before the United States Government Military Court within whose territorial jurisdiction Buschlag, Germany lay, being the court referred to in the petition, and was there arraigned upon the aforementioned charge. She denied the facts and the court accordingly entered for her a plea of not guilty and an additional plea of not guilty by reason of insanity at the time of the commission of the offense charged.

Petitioner was tried in said court on said charge, the name of the court having, in the meantime, been changed, as hereinbefore stated, to United States Court of the Allied High Commission for Germany, and on the 18th day of March, 1950, she was convicted by said court and sentenced to imprisonment for a term of fifteen years. This sentence was within the maximum penalty provided by Section 211 of the German Criminal Code, said section providing for the death penalty, or in exceptional cases, life imprisonment.

Thereafter, on March 21, 1950, petitioner filed an appeal to the Court of Appeals, United States Courts of the Allied High Commission for Germany, at Nürnberg, Germany, and her sentence of imprisonment was confirmed by said court on the 12th day of May, 1950. Her imprisonment in the Federal Reformatory for Women, at

Alderson, West Virginia, United States of America, followed, in conformity with said judgment.

WHEREFORE, respondent prays that the writ of habeas corpus be dismissed and the petitioner remanded to custody.

s/ NINA KINSELLA
Warden, Federal
Reformatory for Women
Respondent

s/ A. GARNETT THOMPSON
United States Attorney, Southern
District of West Virginia
Counsel for Respondent

STATE OF WEST VIRGINIA }
COUNTY OF MONROE } SS.

Nina Kinsella, of full age, being first duly sworn deposes and says that she is the respondent named in the foregoing return, that she has read the said return, and that the facts and matters therein set forth are true to the best of respondent's knowledge and belief.

s/ NINA KINSELLA

Sworn to and subscribed before me this 21st day of July, 1950.

s/ C. H. BIVENS
Notary Public for Monroe
County, West Virginia

My Commission expires April 21, 1951.

Service of a copy of the within Return is hereby accepted this 24th day of July, 1950.

Of Counsel for Petitioner.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the Federal Reformatory for Women, *Respondent.*

TRAVERSE

Comes now petitioner and by her attorneys traverses the return of respondent to the writ issued herein as follows:

1. Petitioner admits that she has not applied for release by motion to the court which tried her; but states that 28 USC, Sec. 2255, is inapplicable because the court which tried and sentenced petitioner is not "a court established by act of Congress" and is otherwise inapplicable.

2. Petitioner denies the allegation of paragraph Second of the return.

3. Petitioner denies the allegations of paragraph Third, subdivision one to six inclusive.

4. Petitioner admits that respondent holds her in confinement as a result of the judgment of a tribunal entitled, "United States Court for the Allied High Commission for Germany, 4th Judicial District," but denies that the Court had jurisdiction to try her or to impose the sentence, denies that the Court convicted her of an offense against the United States, denies that respondent has any power or authority to hold petitioner in confinement or to execute the sentence of the United States Court for the Allied High Commission for Germany, 4th Judicial District, or to hold petitioner as a person convicted of a violation of Section 211 of the German Criminal Code.

Petitioner further denies such other allegations of paragraph Fourth as contradict the allegations of her petition; and with respect to the other allegations in paragraph 4, denies having knowledge or information sufficient to form a belief as to such allegations.

s/ JOSEPH S. ROBINSON

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH S. ROBINSON, being duly sworn, deposes and says that he is one of the attorneys for the petitioner herein; that he has read the foregoing Traverse and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

s/ JOSEPH S. ROBINSON

Sworn to before me, this 31st day of July, 1950.

s/ WILLIAM LIEBER
Notary Public for the
State of New York

JOSEPH S. ROBINSON, Esq.
745 Fifth Avenue
New York 22, New York

HARRINGTON & GRAHAM, Esqs.
454 Washington Building
Washington 5, D. C.

JOHN C. MORRISON, Esq.
1601 Kanawha Valley Building
Charleston 22, West Virginia

Attorneys for Petitioner

Court Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner* vs. NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent.*	Habeas Corpus No. 1095

AGREED STATEMENT OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that for the purposes of this litigation, in addition to what is admitted in the pleadings, the facts herein are as follows (other facts not herein agreed upon may be brought to the Court's attention by either party):

1. The petitioner, Yvette J. Madsen, is a native-born citizen of the United States and a resident of the Borough of Brooklyn, City and State of New York; she was the wife of Lieutenant Andrew E. Madsen, now deceased, and is the mother of two infant children.

2. In or about the month of November 1947 the petitioner and her husband entered the American Zone of Occupied Germany. Permission to so enter was granted to her by competent military authority. She was transported across the Atlantic Ocean on a vessel operated under the jurisdiction of the military authorities and without cost to herself. The orders for her transportation were issued by the military authorities and the said orders stated on their face that "travel herein authorized is necessary in the military service." An identification or "AGO" card, identical to that issued to persons in military uniform, was issued to her by the War Department acting through the Adjutant General's Office. Transportation from the port of disembarkation

was by train reserved exclusively for United States military personnel and was at government expense. Petitioner and her husband were granted facilities, accommodations and billets established for the United States military forces. Petitioner's home was requisitioned for military use and was furnished and maintained by competent U. S. military authorities. Petitioner was authorized to and did use the facilities of the United States Army established for persons in the military service of the United States and persons serving with and accompanying the said armed forces, i.e., United States Army commissaries, United States military hospitals, United States Army post exchanges, United States Army Officers' messes, United States Army garage facilities, United States Army rail, automobile, air and water transportation, United States Army recreation centers, United States Army clothing and general merchandising stores, United States Army scrip (a special currency made available only for those authorized to use it, including persons in the military service of the United States). Petitioner was subjected to certain limitations imposed on persons in the military service, such as the prohibition against entering places marked "off limits" to military personnel, etc. In general she enjoyed all immunities from German jurisdiction granted persons in the armed forces of the United States.

3. On October 20, 1949, while the petitioner was in the status described in the preceding paragraph and while residing in Buchschleg, Kreis Frankfort, in the American Zone of Occupied Germany, she was arrested by the Air Force military police and on October 21, 1949 charged with violation of Section 211 of the German Criminal Code before a tribunal which was then entitled "United States Military Government Court." A summons containing a copy of the charge and particulars was served on the petitioner personally on October 21, 1949. The said court was created pursuant to United

States Military Government Ordinance 31 on 18 August 1948 (and had been functioning since 27 October 1948), with a criminal procedure prescribed by Ordinance 32 of the same date.

4. Section 211 of the German Criminal Code reads as follows in English translation:

> *"Murder—Mord*
>
> "211. *(As in force prior to 4 September 1941).* Whoever intentionally kills a human being is guilty of murder if the killing was accomplished with premeditation, and shall be punished by death.
>
> "211. *(As amended 4 September 1941, RGBI I, 549).* The murdered shall be punished by death.
>
> "A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust);
>
> "For the satisfaction of sexual desire;
>
> "For cupidity (Habgier) or any other base motives;
>
> "In a treacherous or cruel manner or by means causing common danger, or
>
> "In order to make possible or to conceal another offense.
>
> "If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed."

5. On October 21, 1949 a preliminary hearing was held by the court which was continued until October 24. The petitioner and her counsel were present. At the conclusion of said hearing, the petitioner was ordered held for trial.

6. A copy of the charges (copy attached) was served on the accused on November 1, 1949. No further or other charges or particulars were filed against her.

7. On January 1, 1950, Ordinance 31 was amended, by Law #1 promulgated by the U. S. High Commissioner dated December 28, 1949, to change the name of the courts established thereunder from "United States Military Government Courts for Germany" to "United States Courts of the Allied High Commission for Germany." Petitioner was brought to trial before a court of said court system entitled "The United States Court of the Allied High Commission for Germany, Fourth Judicial District" on February 20, 1950. The court was composed of three United States civilians, two of whom had been appointed as district judges, and one of whom had been appointed as magistrate, in accordance with the provisions of Article 13, Sections 1 and 2 of Ordinance 31. They were not nominated or appointed as district judge or magistrate by the President of the United States by or with the advice and consent of the Senate of the United States, nor did they purport to act as judges of any court established under Article III of the Constitution of the United States.

8. At the conclusion of the trial, the court adjudged the defendant guilty as charged. It concluded that paragraph 2 of Section 51 of the German Criminal Code applied, and therefore determined its sentence in accordance with Section 44 of the German Criminal Code. It sentenced the petitioner "to be confined in the Federal Reformatory for Women, Alderson, West Virginia, or elsewhere as the Secretary of the Army may direct, for a term of confinement of fifteen years, beginning 20 October 1949."

9. The material portions of the sections of the German Criminal Code to which reference has just been made read, in English translation, as follows:

"51. (As amended 24 November 1933; RGBl. I, 995). An act does not constitute an offense if the actor at the time of the commission of the act was either unable to realize the forbidden nature of his act or unable to act in accordance with proper understanding because his consciousness was impaired (Bewusstseinsstorung) or because he has suffered either pathological mental derangement or mental infirmity.

"If the ability to realize the forbidden nature of the act, or the ability to act in accordance with its proper understanding, was considerably diminished due to one of the above stated reasons, the punishment may be reduced in accordance with the provisions for the punishment of attempt."

"44. (As amended 5 December 1939; RGBI I, 2378). An attempt at a major or minor crime may be punished more lightly than an accomplished crime.

"(As amended 29 May 1943, RGBI I, 341). If an accomplished major crime is punished by death or by confinement in a penitentiary for life, the attempt may be punished by confinement in a penitentiary but for not less than three years."

10. Thereafter the petitioner, in order to exhaust all remedies, appealed to the Court of Appeals of the United States Courts of the Allied High Commission for Germany, which court was composed of five United States civilians who had been appointed as justices of the Court of Appeals in accordance with the provision of Article 13, Sections 1 and 2, of Ordinance 31. After there had been oral arguments of both parties and after written briefs had been filed with the court by them, the court rendered a written opinion on 10 May 1950 affirming the judgment of the trial court; but by order modified that part of the judgment relating to commitment, because

of a directive issued by the Secretary of State, so as to read that she be committed "to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of fifteen (15) years from 20 October 1949." (A copy of the order is attached.)

11. Petitioner was returned to the United States and on May 20, 1950 delivered to the custody of the United States Marshal. She was taken to Alderson, West Virginia, where she has since been confined in the Federal Reformatory for Women.

12. United States Military Government in Germany was carried on under the Department of the Army until 21 September 1949. On that date the Occupation Statute for Western Germany, agreed to by the governments of the United States, the United Kingdom and France, was declared to be in force, thus putting into effect the Charter of the Allied High Commission, also agreed to by those governments. The Allied High Commission then came into existence and the Honorable John J. McCloy, who had been the United States Military Governor since early July, 1949 after General Lucius D. Clay had vacated that office, ceased to function as such and thereafter functioned as United States High Commissioner pursuant to Executive Order No. 10062. On that date also the Office of Military Government for Germany (the agency which had been administering military government) ceased to function except for certain liquidating operations and the Office of the United States High Commissioner for Germany became the United States agency in the American Zone of Occupied Germany through which the authority vested in the U. S. High Commissioner was exercised.

The Office of the United States High Commissioner and the High Commissioner himself have functioned since September 21, 1949 under the direction of the

Secretary of State. The Department of the Army has had no direct functional responsibility for the operations of that Office or of the High Commissioner since that date, although it has been furnishing certain logistic support for those operations.

13. The respondent herein named is the Warden of the Federal Reformatory for Women and is vested with power to take such action with respect to the petitioner as the Court may direct.

14. By agreeing to the above statement of facts, neither party concedes that all the facts agreed upon are material or necessary for the determination of this controversy. The parties stipulate that the Court may determine which of the facts are to be considered material, relevant and competent under the pleadings as framed. The parties further agree that they will supply the Court with any additional facts which in the Court's opinion are needed for determination of the controversy.

s/ DAYTON M. HARRINGTON
Attorney for Petitioner

s/ JMR
Attorney for Respondent

Court Exhibit 1—(continued)

UNITED STATES MILITARY GOVERNMENT
COURTS FOR GERMANY

CHARGE SHEET

UNITED STATES MILITARY GOVERNMENT

vs.

Yvette J. MADSEN — Frankfurt/Main

18 Buchweg, Buschlag — 31 October 1949

is hereby charged with the following offenses:

Charge:

Violation of Par. 211,
German Criminal Code

Particulars:

In that Yvette J. MADSEN did, at Buschlag, Germany, on or about 20 October, 1949, unlawfully, intentionally and with premeditation, in a treacherous manner, shoot one Andrew E. MADSEN, a human being, in the body with a pistol, as a result of which the aforesaid Andrew E. MADSEN died on 20 October 1949.

I, the undersigned make oath that I have (investigated)* the matters set forth in the above charge (s) and particulars and that the same are true in fact, to the best of my knowledge and belief.

W. F. JOHNSON
WILLIAM F. JOHNSON
(SEAL) TITLE: District Attorney
4th Judicial District

Sworn to and subscribed before me, this 31 October day of 1949

T. T. MARYE
Title: District Judge

Copy of above served on accused 1 November 1949.

JOSEPH D. JORDAN

The above charges are set for Trial before the District Judge at Frankfurt/Main, Bockenheimer Anlage 45 Room 301 on November 10 1949 at 09:00 hours

s/ W. F. JOHNSON

*Strike out the words not applicable. Title:

NOTE: The official text of this form is in English. The German translation on the reverse side is for information only.

RIGHTS OF THE ACCUSED

Every accused before a United States Military Government Court shall be entitled:

(a) To have in advance of trial a copy of the charges upon which he is to be tried;

(b) To be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice.

(c) To consult a lawyer before trial, to the aid of counsel at every stage of the proceedings, and to conduct his own defense or to be represented at the trial by a lawyer of his own choice, subject to the right of the court to debar any person from appearing before the court;

(d) In any case in which a sentence of death may be imposed, to be represented by an officer of the Allied Forces, if he is not otherwise represented;

(e) To bring with him to his trial such material witnesses in his defense as he may wish, or to have them summoned by the court at his request, if practicable;

(f) To apply to the court for an adjournment where necessary to enable him to prepare his defense;

(g) To have the proceedings translated, when he is otherwise unable to understand the language in which they are conducted.

OMGUS 9-556 L Feb 49

Court Exhibit 1—(continued)

UNITED STATES COURTS OF THE ALLIED HIGH COMMISSION FOR GERMANY
COURT OF APPEALS

OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR GERMANY vs. YVETTE J. MADSEN	Case No. 428 In the COURT OF APPEALS

ORDER

The Court having considered the above entitled case on appeal, for the reasons stated in the opinion delivered and ordered filed this date, holds that the judgment of the District Court of the Fourth Judicial District should be, and it is hereby, affirmed.

Whereas, however, the judgment of the District Court provided that the accused, Yvette J. Madsen, "be confined in the Federal Reformatory for Women, Alder-

son, West Virginia or elsewhere as the Secretary of the Army may direct, for a term of confinement of fifteen (15) years, beginning on 20 October, 1949", and, whereas, under a Directive of the Secretary of State, which is now in effect, the said accused should be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment, therefore, this Court deems it within its proper function to correct that error without further action of the trial court.

That part of the judgment of the District Court committing the said accused to "The Federal Reformatory for Women, Alderson, West Virginia or elsewhere as the Secretary of the Army may direct, is changed so that the said accused hereby is committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of fifteen (15) years from 20 October 1949.

It is ordered that the Clerk deliver a certified copy of this order and commitment to the Provost Marshal of the European Command, U. S. Army, or his authorized representative who is directed to deliver the said accused to the Department of Justice, Staten Island, New York, U.S.A., and that the copy serve as the Commitment of the accused.

Ordered at Nurnberg, Germany, this 12th day of May 1950.

A Certified True Copy:

s/ FLOYD W. KING
Acting Clerk

s/ WILLIAM CLARK
Chief Justice

s/ JUAN SEDILLO
Associate Justice

s/ H. LLOYD ERICSSON
Associate Justice

Court Exhibit 2

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent.*

Upon Habeas Corpus No. 1095

SUPPLEMENTAL AGREED STATEMENT OF FACTS

The following facts are agreed upon relative to the commitment of the petitioner at the Federal Reformatory for Women, Alderson, West Virginia:

On May 18, 1950, the Warden of the Reformatory received a copy of a letter dated May 15, 1950, written by James V. Bennett, Director, Bureau of Prisons, to Mr. W. Bruce Matthews, United States Marshal, Washington, D. C., reading as follows:

> "The Federal Reformatory for Women, Alderson, West Virginia, is designated as the place of confinement for Mrs. Yvette J. Madsen, who was sentenced to a term of 15 years by the United States Court for the Allied High Command for Germany.
>
> "We have been advised that Mrs. Madsen will be transported to Washington by the Air Force some time this week. The State Department will notify us as soon as they learn the definite arrival time and we will notify your office."

On May 20, 1950, the Warden received a telegram or teletype from the Assistant Director, Bureau of Prisons, advising that two girls were arriving the following day.

On May 21, 1950, W. Bruce Matthews, United States Marshal, Washington, D. C., by his deputy, Margaret E.

Ferris, delivered petitioner into the custody of the Warden of said Reformatory, at Alderson, West Virginia. At the same time, there was delivered by the Marshal to the Warden a certified copy of commitment order of the military tribunal which tried the petitioner in Germany, dated March 18, 1950, and a certified copy of the order of the Court of Appeals, United States Courts of the Allied High Commission for Germany, dated May 12, 1950, sustaining the conviction of petitioner and directing her to be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of fifteen (15) years from 20 October, 1949.

There were no other papers received by the Warden of said Reformatory in connection with the commitment of petitioner.

Court Exhibit 2—(continued)

Form OMGUS—537
23 Feb 49)

UNITED STATES COURTS OF THE ALLIED HIGH COMMISSION FOR GERMANY

COMMITMENT OF FEMALE U. S. OCCUPATION PERSONNEL SENTENCED TO TERMS OF CONFINEMENT

OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR GERMANY	No. D1 109
vs.	Fourth Judicial District
YVETTE J. MADSEN	—District Judge

To the Officer-in-Charge of: Federal Reformatory for Women, Alderson, West Virginia, or any other prison

to which the prisoner may hereafter be lawfully transferred:

Yvette J. Madsen has been convicted of the offense of Violation of Par. 211, German Criminal Code, in that she did, at Buschlag, Germany, on or about 20 October 1949, unlawfully, intentionally and with premeditation, in a treacherous manner, shoot one Andrew E. Madsen, a human being, in the body with a pistol, as a result of which the aforesaid Andrew E. Madsen, died on 20 October 1949, and has been sentenced by the Magistrate-District Court to be confined for a period of fifteen (15) years, the said sentence to commence on 20 October, 1949, and to be confined in such place as prescribed by Headquarters, European Command, pending final disposition of the case by the reviewing or appellate authority, and thereafter with respect to any unserved or unremitted portion of the sentence to be confined in the Federal Reformatory for Women, Alderson, West Virginia, or elsewhere as the Secretary of the Army shall direct.

You are hereby directed to receive the above named prisoner into your custody and detain her in accordance with the sentence so imposed or until further order of the Court, or other competent authority, and for so doing this shall be sufficient warrant.

Signed this 18th day of March, 1950

s/ JOHN J. SPEIGHT
Judge

s/ HERMAN ELEGANT
Judge

s/ FRED J. COHN
Presiding District Judge
Fourth Judicial District
APO 757, US Army

CERTIFIED TRUE COPY

s/ MANFRED GUGGENHEIM
Clerk of Court
US Courts of the Allied High
Commission for Germany
4th Judicial District.

Petitioner's Exhibit 1

Appendix V

CHARTER OF THE ALLIED HIGH COMMISSION FOR GERMANY

I

ESTABLISHMENT OF ALLIED HIGH COMMISSION

and

TRANSFER OF CONTROL

1. An Allied High Commission (hereinafter referred to as the High Commission) is hereby established for the exercise of supreme Allied authority in the Federal Republic of Germany. The High Commission shall be headed by three High Commissioners, one designated by each of the three powers signatory hereto.

2. As from the date of the entry into force of the Occupation Statute all authority with respect to the control of Germany or over any governmental authority thereof, vested in or exercised by the respective Commanders in Chief of the forces of occupation of the three powers in Germany, from whatever source derived and however exercised, will be transferred to the three High Commissioners respectively to be exercised in accordance with the provisions hereof and of the Occupation Statute.

3. The forces of occupation of the three powers in Germany shall remain stationed in their respective zones of occupation. Command of the forces of occupation in each zone and control of their related military establishments shall remain with the respective Commanders of the forces of occupation in such zone.

4. Legislation of the Occupation Authorities enacted before the effective date of the Occupation Statute shall remain in force until repealed or amended or otherwise replaced as provided in the Occupation Statute.

II

FUNCTIONS OF THE HIGH COMMISSION

1. The High Commission shall exercise control over the Federal Government and the Governments of its constituent Laender (States), as provided in the Occupation Statute. In the exercise of the powers reserved to the Occupation Authorities under said Statute, the High Commission shall reach its decisions in accordance with the provisions of the "Agreement as to Tripartite Controls" among the three powers dated April 8, 1949, and attached hereto and made part of this instrument as Annex A. These decisions shall constitute a joint exercise of the authority of all of the three High Commissioners.

2. The High Commission shall act only through the Federal or appropriate Land (State) Government except where direct action or legislation by the High Commission is necessary or appropriate for the due exercise of any of the powers reserved to the Occupation Authorities under the Occupation Statute.

3. The Headquarters of the High Commission shall be at the seat of the German Federal Government which together with a surrounding area to be defined will constitute a special area directly under the High Commis-

sion and excluded from any individual zone of occupation. The necessary special arrangements in connection with the definition and administration of this area in as far as they concern the Allies will be determined subsequently by the High Commission.

III

ORGANIZATION OF THE HIGH COMMISSION

1. The organization of the High Commission at its headquarters shall be tripartite in character and shall consist of:

a. an Allied Council (hereinafter referred to as "the Council") composed of the three High Commissioners. Each High Commissioner shall nominate a Deputy or permanent representative who will take his place on the Council in his absence. The Deputies or permanent representatives of the respective High Commissioners acting together may function as an Executive Committee of the Council if the Council so decides;

b. such committees or bodies as the Council may from time to time establish. These committees and bodies shall advise the Council in their respective spheres and shall exercise such executive functions as the Council may delegate to them. The number, functions, and organization of such committees or bodies may be changed, adjusted, or eliminated entirely by the Council in the light of experience. Subject to the above, in order to ensure continuity of operation, the Council initially shall be assisted by committees, respectively for political affairs, foreign trade and exchange, finance, economics, law, and by the Military Security Board. Each committee shall be assisted by such associated staff as it may require and as the Council approve;

c. an Allied General Secretariat.

2. The Council.

The Council shall constitute the supreme authority of the High Commission. The Council shall meet as frequently as it considers necessary and at any time upon the request of any of its members. The chairmanship of the Council and its various committees shall be held in monthly rotation by each of its members. The Council shall fix the time and place of its meetings and shall establish appropriate rules and procedures for the conduct of its business. Decisions of the Council shall be reached in accordance with Annex A hereof.

3. Committees.

The composition of each committee and its terms of reference shall be fixed by the Council. Initially, such committees, together with their respective terms of reference, shall be as follows:

a. the Political Affairs Committee, consisting of the Political Advisers to the respective High Commissioners, will be concerned with all political and foreign affairs of the German Federal and Land Governments coming within the competence of the Council;

b. a Foreign Trade and Exchange Committee, consisting of the respective Economic and Finance Advisers of each of the High Commissioners.

(i) the committee shall observe the economic, financial, and foreign trade policies of the German authorities and shall advise the Council if such policies or any action taken or proposed to be taken pursuant thereto is likely to have such adverse effect on the foreign trade or foreign exchange resources of the German Government as is likely to increase its need for external assistance;

(ii) the members of the committee shall automatically be members of the Board of Directors of the

Joint Export-Import Agency (hereinafter referred to as "JEIA") and in conjunction with the other directors shall be charged with the orderly liquidation of JEIA at the earliest practicable date. The committee shall assume any control functions presently exercised by JEIA as may warrant retention when the liquidation of JEIA is completed;

(iii) it is understood that the German Federal Republic will become a party to the convention for European Economic Cooperation and will execute a bilateral agreement with the Government of the United States. It is further understood that thereafter the functions of the High Commission in respect of the matters referred to in (i) will be appropriately modified;

c. the Economics Committee, consisting of the Economics Advisers to the respective High Commissioners, shall observe the general economic policies of the German authorities and shall advise the Council as to the exercise of its powers in this connection reserved under the Occupation Statute. The Committee shall advise the Council on all matters relating to the decartelization and deconcentration of German industry;

d. the Finance Committee, consisting of the Finance Advisers to the respective High Commissioners, shall observe the general financial policies of the German authorities, and shall advise the Council as to the exercise of its powers in this connection reserved under the Occupation Statute. To the extent necessary within the limits of the provisions of the Occupation Statute, the Finance Committee shall succeed to and shall assume the functions heretofore exercised by the Allied Bank Commission.

e. the Law Committee, consisting of the Legal Advisers to the respective High Commissioners, shall ad-

vise the Council and its committees on all legal and judicial affairs arising out of the work of the High Commission;

f. the Military Security Board shall deal with all matters of demilitarization, disarmament, industrial prohibitions and limitations, and scientific research in accordance with its existing terms of reference.

4. Committee Staffs and Subordinate Groups.

a. within numerical limitations established by the Council, each of the committees designated pursuant to paragraph 3 of this Article III shall establish such tripartite subordinate committees or other groups as may be necessary to the performance of its functions and as the Council may approve;

b. except as specifically otherwise provided in subparagraph c of this paragraph 4, personnel for such subordinate committees or groups shall be appointed by each of the High Commissioners on a basis of parity among the three Allied nations. They may include military personnel. The number, functions, and organization of such subordinate committees or groups may be changed, adjusted, or eliminated entirely by the Council in the light of experience. Each subordinate committee or group shall be answerable to the committee responsible for its creation and shall report to the Council through such committee. Each subordinate agency shall be physically located at the headquarters of the High Commission except as may be otherwise determined by the Council;

c. the subordinate committees and groups established pursuant to subparagraph a of this paragraph 4 shall include:

(i) Joint Export-Import Agency which, until liquidated as provided in subparagraph b of paragraph 3 hereof, shall function under its existing

terms of reference with an integrated staff and shall report to the Committee on Foreign Trade and Exchange through its Director General who together with the deputy Directors General shall be members of the Board of Directors of JEIA;

(ii) the Decartelization and Industrial Deconcentration Group, the Coal Control Group, and the Steel Control Group, all of which shall report through the Economics Committee;

(iii) the Combined Travel Board which shall report through the Political Affairs Committee;

(iv) Civil Aviation Board which shall report as determined by the Council;

(v) an Information and Cultural Affairs Sub-Committee which shall report through the Political Affairs Committee;

(vi) a Sub-Committee on Foreign Interests which shall report as determined by the Council.

5. Allied General Secretariat.

The High Commission shall be served by a Tripartite General Secretariat. The Secretariat will receive and dispatch all communications to or from the High Commission, prepare the agenda and materials for the meetings of the Council, and shall keep the minutes of their meetings. The Secretariat or its appropriate branches shall act as the channel of communication between the High Commission and the agencies of the Federal Government, and between the Council and the several Land Commissioners with respect to matters affecting said Land Governments. The Secretariat shall maintain the records of the High Commission and be responsible for such other tasks as the Council may decide.

IV

LAND COMMISSIONERS

1. All powers of the High Commission shall be uniformly exercised in the constituent Laender (States) of the Federal Republic, in accordance with tripartite policies and the directions of the Council.

2. To achieve uniformity in the exercise of its powers, the High Commission shall be represented at the seat of government of each of the constituent Laender by an Allied Land (State) Commissioner who shall be solely responsible to the Council for ensuring due compliance on the part of the Land authorities with the Council's decisions and directives. The Land Commissioner shall report and be solely responsible to the Council for all matters of tripartite concern in the Land and shall be the exclusive channel of communication and liaison between the Council and the Land Government with respect to such matters.

3. In particular each Land Commissioner shall be responsible to the Council for:

(a) initial consideration and prompt transmittal to the Council of Land legislation, together with his recommendations thereon;

(b) observing and ensuring due compliance on the part of the Land Government with the provisions of the Federal and Land Constitutions, the Occupation Statute, and the laws of the Occupation Authorities in force;

(c) providing information as required by the Military Security Board and giving all necessary assistance to the inspectorate of the Military Security Board and such other bodies as may be authorized by the Council;

(d) the preparation of such periodic or special reports as the Council may request.

4. Each Land Commissioner and the members of his staff shall be nationals of the power in whose zone the Land is situated, and shall be appointed by and administratively responsible to the High Commissioner designated by such power. Each Land Commissioner shall be accountable exclusively to his High Commissioner and shall be his channel of communication and liaison with the Land Government with respect to:

(a) all matters which are listed in Article V, paragraph 2;

(b) conduct of all relationships between the forces of occupation stationed in the Land and the governmental agencies thereof except to the extent that direct communications and relations may be authorized by him.

5. Each High Commissioner shall designate an observer together with a small personal staff to be agreed in each case by the High Commissioners concerned, to each of the Land Commissioners outside of his own zone for purposes of consultation and information.

V

INDIVIDUAL RESPONSIBILITIES OF THE HIGH COMMISSIONERS

1. Each High Commissioner shall maintain at the seat of government of each of the Laender in his zone a Land Commissioner with the minimum staff and facilities required for the purposes set forth in Articles IV and V hereof. He shall ensure the due implementation by each of said Land Commissioners of the decisions and directions of the Council. He shall also ensure that all powers of the High Commission are uniformly exercised within

said Laender in accordance with tripartite policy and the decisions of the Council.

2. Each High Commissioner shall be responsible to his Government with respect to the Laender of his zone for the matters in fields reserved to Occupation Authorities listed below. Nevertheless so far as possible, he shall coordinate the general policies which he may pursue in these fields with those of the other High Commissioners and exercise these powers in accordance with such tripartite legislation or policies as the Council may adopt:

(a) maintenance of law and order if the responsible German authorities are unable to do so;

(b) ensuring the protection, prestige, security and immunities of the Allied forces of occupation; of the Allied Occupation Authorities, their dependents, employees and official representatives;

(c) the delivery of reparations and restitutable property;

(d) care and administration of displaced persons;

(e) the disposition of war criminals;

(f) administration of justice in cases falling within the jurisdiction of Allied Courts;

(g) control of the care and treatment in German prisons of persons charged before or sentenced by the Courts or tribunals of the Occupation Authorities, over the carrying out of sentences imposed on them and over questions of amnesty, pardon or release in relation to them.

3. Each High Commissioner shall be individually responsible for the formulation annually, in accordance with tripartite policies and criteria, of a budget of occupation costs and other requirements within his zone. Such budget shall be formulated and submitted to the

Council, on a date to be determined by it, for consideration and approval by the Council and for consolidation in a total budget of the Occupation Authorities for transmission to the German Government. Each High Commissioner shall be responsible to the Council for control of the approved budget for his zone in accordance with accounting standards and procedures established by the Council.

VI

DECISIONS OF THE COUNCIL

1. Formal decisions and directions of the Council affecting the Federal Government or any agency thereof shall be in writing and shall be communicated to the Chancellor by or on behalf of the Council.

2. Formal communications involving matters of lesser import or of a routine character may be addressed to the Minister concerned by the appropriate organ of the Council.

3. Formal decisions or directions of the Council affecting a Land Government or any agency thereof shall be in writing and shall be communicated to its Minister President through the Land Commissioner, in the name of the Council.

4. Formal decisions of the Council shall be recorded in an official gazette maintained by the High Commission at the Allied seat of control in Germany which shall be published in the English, French, and German languages. Publication of any such decision in the official gazette of the High Commission shall be conclusive evidence that the recorded action or decision was taken pursuant to the powers vested in the Occupation Authorities under the Occupation Statute.

VII

INTERNATIONAL AUTHORITY FOR THE RUHR

The High Commission shall take all necessary steps to give effect to Article 22 of the Agreement establishing the International Authority for the Ruhr of April 28, 1949.

VIII

FOREIGN MISSIONS IN GERMANY

The necessary liaison with the governments of other nations especially interested will be ensured by the appointment of such governments of appropriate missions to the Council of the High Commission having access, by procedures to be determined. to its subordinate bodies and to the German Government.

IX

UNITED NATIONS ORGANIZATIONS IN GERMANY

United Nations organizations and specialized agencies may operate in the Federal Republic of Germany on such terms as may be agreed by the Council.

X

OFFICIAL LANGUAGES

The official languages of the High Commission shall be English and French. Authoritative German texts of documents shall be provided as necessary.

XI

IN WITNESS WHEREOF the foregoing agreement has been duly executed by the respective representatives thereunto duly authorized of the Governments of the United Kingdom of Great Britain, the United States of America, and the Republic of France, in triplicate in the

French and English languages, each text being equally authentic and shall come into effect on the date of the entry into force of the Occupation Statute.

Paris
June 16, 1949

Petitioner's Exhibit 2

DEPARTMENT OF STATE

FOR THE PRESS APRIL 8, 1949
No. 226

FOR RELEASE AT 1:40 P. M., E.S.T., FRIDAY, APRIL 8, 1949. NOT TO BE PREVIOUSLY PUBLISHED, QUOTED FROM OR USED IN ANY WAY.

COMMUNIQUE

The Foreign Ministers of the United States, United Kingdom, and France have discussed in Washington the whole range of issues now pending in connection with Germany and have arrived at complete agreement.

The text of an Occupation Statute in a new and simpler form has been approved and is being transmitted to the German Parliamentary Council at Bonn. Agreement was reached on the basic principles to govern the exercise of Allied powers and responsibilities and also the tripartite Allied control machinery. The Foreign Ministers confirmed and approved agreements on the subject of plant dismantling, prohibited and restricted industries, and the establishment of an International Ruhr Authority, all of which were recently negotiated in London.

The Occupation Statute will define the powers to be retained by the occupation authorities upon the establishment of the German Federal Republic and set forth basic procedures for the operation of Allied supervision. Subject only to the limitations of the Statute, the Ger-

man Federal State, and the participating Laender will have full legislative, executive and judicial powers, in accordance with the Basic Law and with their respective constitutions. The Statute aims to permit the German people to exercise democratic self-government. Provision is made for a review of the terms of the Statute after a year in force.

With the establishment of the German Federal Republic there will be a marked change in the organization to carry out occupation responsibilities. Military Government as such will be terminated and the functions of the Allied authorities will become mainly supervisory. Each of the Allied establishments in Germany will come under the direction of a High Commissioner, aside from the occupation forces which will remain headed by Military Commanders. The three High Commissioners together will constitute an allied High Commission which will be the supreme Allied agency of control. In order to permit the German Federal Republic to exercise increased responsibility for domestic affairs and to reduce the burden of occupation costs, staff personnel shall be kept to a minimum.

The German government authorities will be at liberty to take administrative and legislative action and such action will have validity if not disapproved by Allied authorities. There will be certain limited fields in which the Allies will reserve the right to take direct action themselves, or to direct German authorities to take action. However, these fields will be limited, and aside from security matters the exercise of direct powers by the Allies is regarded in many instances as self-liquidating in nature.

It was agreed that a major objective of the three Allied Governments was to encourage and facilitate the closest integration, on a mutually beneficial basis, of the German people under a democratic federal state within the frame-

work of a European association. In this connection it is understood that the German Federal Republic will negotiate a separate bilateral ECA agreement with the United States and should participate as a full member in the Organization for European Economic Cooperation, thus becoming a responsible partner in the European Recovery Program.

Petitioner's Exhibit 3

IMMEDIATE RELEASE MAY 18, 1949

The President today announced that he is sending to Senate the nomination of Mr. John J. McCloy to be United States High Commissioner for Germany and Chief of Mission. Tentative plans are that Mr. McCloy, upon confirmation, will take up his duties in Germany within the near future.

In sending the nomination of Mr. McCloy to the Senate the President indicated his great reluctance to ask Mr. McCloy to relinquish his position with the World Bank because of the importance he attaches to the role the Bank can play in the economic reconstruction and development of the world. He did so only after being satisfied that a successor thoroughly equipped to carry on the work of the Bank was available for the Presidency of the Bank.

Mr. McCloy's resignation as President of the World Bank for Reconstruction and Development will become effective not later than July 1, 1949.

One of the matters which Mr. McCloy will take under early advisement will be the development of plans for the transfer of responsibility for non-military aspects of the United States occupation of Germany from the Department of the Army to the Department of State and the Economic Cooperation Administration. This transfer will

take place on or about the time of the establishment o the German Provisional Government.

The appointment of Mr. McCloy as United States Hig Commissioner for Germany grows out of the Washingto meeting of the Foreign Ministers of the United Kingdom France and the Secretary of State, at which agreemen was reached on the establishment of Tripartite Contro Machinery for West Germany.

As United States High Commissioner, Mr. McCloy wi be the supreme United States authority in Germany Subject to consultation with and ultimate direction b the President, he will be under the immediate super vision and direction of the Secretary of State. He wi have the authority to exercise all the governmental func tions of the United States in Germany, other than th Command of the United States Occupation Forces. H will represent the United States on the Allied High Com mission for Germany (United States-United Kingdom France) when established and will exercise the appro priate functions of a Chief of Mission, Class One, withi the meaning of the Foreign Service Act of August 1 1946.

Subject to consultation with and ultimate directio by the President, Mr. McCloy will be the representativ of the Economic Cooperation Administration in all it relations and actions with respect to Germany. As re gards these functions he will be under the immediat supervision and direction of the Administrator for Eco nomic Cooperation (Mr. Hoffman) and the coordinatio of the United States Special Representative in Europ (Mr. Harriman). Mr. McCloy will be assisted by a Chie of Special Mission to be appointed by Mr. Hoffman, wh will have the rank of Minister and act under the imm diate supervision and direction of the United States Hig Commissioner.

On military matters, the Military Commander will continue to receive instructions directly from the Joint Chiefs of Staff. However, the High Commissioner will be authorized to direct the United States Commanding General to intervene for the maintenance of law and order and to take such other action as is required to support United States policy in Germany. During the period prior to the transfer of military government responsibility from the Secretary of Defense to the Secretary of State, the High Commissioner will also be the Military Governor of the United States Zone in Germany. In this capacity he will be under the immediate supervision of the Secretary of Defense, subject of course to consultation with and ultimate direction by the President.

It is contemplated that to the maximum extent practicable, existing personnel of OMGUS in Germany and of the Army Department in Washington will be utilized in staffing the organization of the High Commissioner, including the ECA Mission in Germany; and the appropriate additional Washington facilities of the Department of State and ECA.

Mr. McCloy was born in Philadelphia on March 31, 1895. He attended Peddie School and was graduated (A.B.) from Amherst College in 1916 and from Harvard (LL.B.) in 1921. Admitted to the New York Bar in 1921, he became subsequently a partner of Cravath, de Gersdorff, Swaine and Wood, from which he resigned in 1940 to assist Secretary of War Henry L. Stimson. He was also Chairman of the Combined Civil Affairs Committee of the Combined Chiefs of Staff. Mr. McCloy was awarded the Distinguished Service Medal by President Truman for his war work and was honored by France with the rank of Grand officer of the Legion of Honor.

In 1941 he was appointed the Assistant Secretary of War, in which capacity he served until 1945. He resigned from that position to return to the practice of law and

became a member of the firm of Milbank, Tweed, Hope, Hadley and McCloy. He became President and Chairman of the Board of the International Bank for Reconstruction and Development on March 17, 1947.

Mr. McCloy served abroad in the First World War as an artillery captain in the American Expeditionary Forces. On April 25, 1930 Mr. McCloy was married to Ellen Zinsser. They have two children, John, aged 11, and Ellen, aged 7.

Petitioner's Exhibit 3

Appendix I

EXECUTIVE ORDER
10062

Establishing the Position of United States High Commissioner for Germany

By virtue of the authority vested in me by the Constitution and the Statutes, including the Foreign Service Act of 1946 (60 Stat. 999), and as President of the United States and Commander in Chief of the Armed Forces of the United States, it is ordered as follows:

1. There is hereby established the position of United States High Commissioner for Germany, which position shall be that of Chief of Mission, Class 1, in accordance with the provisions of the said Foreign Service Act of 1946.

2. The United States High Commissioner for Germany, hereinafter referred to as the High Commissioner, shall be the supreme United States authority in Germany. The High Commissioner shall have the authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the

governmental functions of the United States in Germany (other than the command of troops), including representation of the United States on the Allied High Commission for Germany when established, and the exercise of appropriate functions of a Chief of Mission within the meaning of the Foreign Service Act of 1946.

3. With respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff. On request of the High Commissioner, such Commander shall take the necessary measures for the maintenance of law and order and such other action as is required to support the policy of the United States in Germany. If major differences arise over policy matters affecting military matters, necessary reports and recommendations shall be referred to the Department of State and to the National Military Establishment for resolution. In the event of an emergency involving the security of the United States forces in Europe, such Commander may take whatever action he considers essential to safeguard the security of his troops.

4. In the event that the High Commissioner shall assume his duties in accordance with this Executive Order prior to the date that the Military Government of the United States Zone of Germany is terminated, he shall, during such interval, report to the Secretary of Defense through the Secretary of the Army and shall be the United States Military Governor with all powers thereof including those vested in the United States Military Governor under all international agreements.

THE WHITE HOUSE
June 6, 1949

Harry S. Truman

Petitioner's Exhibit 4

DEPARTMENT OF STATE

FOR THE PRESS SEPTEMBER 21, 1949
NO. 729

STATEMENT BY ACTING SECRETARY OF STATE JAMES E. WEBB

Today marks the beginning of a new phase in the occupation of Germany. Having freely elected a Parliament and selected a President and a cabinet under the terms of the Basic Law drafted at Bonn and ratified by the German states, the people of two-thirds of Germany are regaining today a large measure of self-government under the Occupation Statute and the Allied High Commission. It is our regret that not all the German people are free to join in the re-establishment of their self-government. It is through no wish or act of ours that the Germans in the Eastern Zone are not yet able to play a role in the new Germany which is about to emerge. The door is open to them, however, and we expect that the day will come when they will be able to enter on truly democratic terms.

The new state of affairs in Germany will present a challenge equally to the Germans and to the United States and the other Occupation Powers. For us it means we have entered that delicate stage in which we relinquish our close grasp of the administration of government and content ourselves for the most part with observing events and giving advice, encouragement and economic support. In a limited sphere, of course, we retain direct control, and sufficient power is reserved to safeguard the chief purposes of the occupation. We are fully prepared to use that power, if need be, because we are resolved to prevent a return to power of the Nazis. But we are likewise resolved to use our power sparingly and with restraint and to proceed towards the re-estab-

lishment of a normal situation as rapidly as possible. In this tremendous task of reintegrating Germany into the family of democratic nations, success is dependent upon sympathetic cooperation and support from the American people.

The speed with which a return to normality can be achieved will depend largely on the German people themselves. This is why we say that the Germans face a challenge and an opportunity in the new state of affairs. The challenge is to rehabilitate themselves as a nation and to show by their acts that they merit the confidence we are reposing in them. The opportunity is for them to play that constructive role in the development of the new Europe which their talents, their position and their resources should enable them to play. Through the painstaking labors of the occupation powers during the past four years, during which the American contribution has been of great importance, a solid economic and political foundation has been laid in the Western Zones. It is for the Germans themselves now to build a solid superstructure.

We in the United States wish the German people success in their endeavors to achieve this goal.

Petitioner's Exhibit 5

DEPARTMENT OF STATE

FOR THE PRESS APRIL 13, 1949
NO. 247

OCCUPATION STATUTE AND THE BASIC LAW

At his press conference today Secretary Acheson made the following statement:

Our information indicates that the preliminary German reaction to the Occupation Statute has not been un-

favorable. We expect that there will be increased understanding as the German political leaders and public have a chance to examine the background against which the Washington agreements were made and the purpose they are meant to serve.

The Occupation Statute sets forth the maximum powers which the Allied authorities mean to reserve. The key issue for the future will be the manner and extent to which the Allied authorities will exercise their powers. In this connection, I should like to point out that the three Governments had in mind establishing a practicable basis of cooperation with the future Federal German Government and declared it to be a major objective to facilitate the closest integration of the German people under their own government within the framework of European association.

I have noted the fears expressed that the occupying countries would use their powers to suppress future German industrial competition. This is a baseless assumption, since it has always been our aim to make Germany self-sufficient to the greatest possible degree in order to reduce the need for outside assistance.

The retention of control over research is a justifiable adjunct of continued German demilitarization and this is the context in which the pertinent provision of the occupation statute was framed.

As regards control over foreign trade, this is a protection of direct benefit to the German administration itself, since we must assure ourselves that the funds we are supplying are properly used and are not squandered. In the meantime we will, of course, permit and encourage the Germans to develop their own foreign trade resources so that they themselves may contribute as far as possible to their own support and to the production of goods for the benefit of Europe as a whole.

With respect to the Basic Law, certain features of which are still under discussion, our interest is that a solution will be found preserving the federal character of the government which the Germans have been authorized to set up and we hope that early agreement can be reached on this issue.

Petitioner's Exhibit 5

DEPARTMENT OF STATE

FOR THE PRESS APRIL 25, 1949
No. 287

FOR RELEASE AT 10:00 A. M., E.D.T., TUESDAY, APRIL 26, 1949. NOT TO BE PREVIOUSLY PUBLISHED, QUOTED FROM OR USED IN ANY WAY.

The Department of State today made public the text of the agreement reached in Washington on April 8, 1949, between the Governments of France, the United Kingdom, and the United States on the basic principles for the merger of the three western German zones of occupation. The purpose of this agreement is to define the organization and procedures through which the powers of the occupying governments will be exercised after the establishment of a provisional German government. The agreement provides for a High Commission, to be composed of a High Commissioner for each of the occupying governments, and it outlines the manner in which the Commissioners will vote and reach their decisions. The nature and extent of the powers to be exercised by the occupying governments have been fully set out in the occupation statute, which has already been released for publication (Press Release No. 235, April 8, 1949).

The provisions of this agreement as to tripartite controls will be applied so far as practical to Berlin.

The three governments also agreed to and recorded in their minutes the principles according to which their powers and responsibilities will be exercised after the establishment of a German Federal Republic. While the occupying governments will retain supreme authority, it is intended that military government will be terminated and that the function of the occupation officials will be mainly supervisory. The German authorities will be free to take administrative or legislative action, and this action will be valid unless it is vetoed by allied authority. The fields in which the occupation authorities reserve the right to take direct action themselves including the issuance of orders to German federal and local officials, will be restricted to a minimum, and it is expected that, with the exception of security questions the exercise of direct powers will be of a temporary and self-liquidating nature. After the German Federal Republic has been established, the Economic Cooperation Administration will assume the responsibility for supervising the use of funds made available by the United States Government to the German economy for purposes of relief and recovery. It is envisaged that the German Federal Republic will become a party to the Convention for European Economic Cooperation and will also conclude a bilateral agreement with the Government of the United States. When the German Republic has been established and military government has been brought to an end, the strictly military functions of the occupation authorities will be exercised by a Commander-in-Chief, and all other functions by a High Commissioner, who will direct each of the Allied establishments in Germany other than the occupation forces. It is intended that the size of the staffs to be maintained in Germany will be kept to a minimum. A major objective of the three Allied Governments is to bring about the closest integration, on a mutually beneficial basis, of the German people under a democratic federal state within the framework of a European association.

Petitioner's Exhibit 6

LAW NO. 25

APPLICATION OF PENAL PROVISIONS IN OCCUPATION LEGISLATION

The Council of the Allied High Commission enacts as follows:

In the absence of any provision to the contrary, provisions of a penal character in any legislation of the Allied High Commission or of a High Commissioner enacted on or after 21 September 1949 shall not apply to:

(a) the Occupation Authorities;

(b) members of the Occupation Forces;

(c) nationals of the Occupying Powers, civilian or military, who are serving with the Occupation Authorities or Forces;

(d) members of the families of, and nationals of the Occupying Powers in the service of, the persons referred to in paragraphs (a), (b) and (c) of this Article.

Done at
BONN, Petersburg, on 4 May 1950.

JOHN J. McCLOY
U. S. High Commissioner
for Germany

A. FRANCOIS-PONCET
French High Commissioner
for Germany

B. H. ROBERTSON
U. K. High Commissioner
for Germany

Petitioner's Exhibit 8

MAIL TO ALDERSON

RECEIVED
May 18, 1950
Alderson, W. Va.

NOTED
WARDEN

May 15, 1950

Mr. W. Bruce Matthews
United States Marshal
Washington, D. C.

Dear Marshal Matthews:

The Federal Reformatory for Women, Alderson, West Virginia, is designated as the place of confinement for Mrs. Yvette J. Madsen, who was sentenced to a term of 15 years by the United States Court for the Allied High Command for Germany.

We have been advised that Mrs. Madsen will be transported to Washington by the Air Force some time this week. The State Department will notify us as soon as they learn the definite arrival time and we will notify your office.

Sincerely yours,

By direction of the Attorney General
JAMES V. BENNETT
Director, Bureau of Prisons

FL:hd

Petitioner's Exhibit 10

UNITED STATES MILITARY GOVERNMENT
COURTS FOR GERMANY
FOURTH JUDICIAL DISTRICT
Frankfurt/Main

In District Court
Frankfurt/Germany

UNITED STATES MILITARY GOVERNMENT
vs. ORDER DESIGNATING COURT
YVETTE J. MADSEN, *Defendant*

Under the authority vested in me I hereby designate

JOHN J. SPEICHT, District Judge

HERMAN ELEGANT, Senior Magistrate

and myself as a three judge panel to try the above styled cause.

DONE AND ORDERED at FRANKFURT, GERMANY on this the twenty-eighth day of November AD 1949

s/ Fred J. Cohn
t/ FRED J. CONN
Chief Presiding District Judge

CERTIFIED TRUE COPY

Manfred Guggenheim
Clerk of Court

Respondent's Exihibit 1

OFFICE OF THE U. S. HIGH COMMISSIONER
FOR GERMANY
APO 757

STAFF ANNOUNCEMENT

NO. 1 21 September 1949

ESTABLISHMENT OF THE OFFICE OF THE U. S. HIGH COMMISSIONER FOR GERMANY

1. Effective 21 September 1949, in accordance with the provisions of Executive Order No. 10062, the authority residing in the U. S. Military Governor and the Office of Military Government for Germany (U. S.) for the governmental functions of the U. S. in Germany is as-

sumed fully and exclusively by the U. S. High Commissioner for Germany. All powers vested in the United States Military Governor including those vested under all international agreements, are transferred to the U. S. High Commissioner for Germany.

2. The Office of the U. S. High Commissioner for Germany is hereby established as the agency through which the authority vested in the U. S. High Commissioner shall be exercised. Its organization shall be as shown in the attached charts, and its functions shall be assigned among its constituent elements as set forth in separate issuances, effective this date.

3. As provided in Executive Order 10063, the undersigned, as U. S. High Commissioner for Germany, shall also be ECA Representative for Germany and shall be assisted by the Chief, ECA Special Mission to Germany, who shall also be Director, Office of Economic Affairs in the Office of the U. S. High Commissioner for Germany.

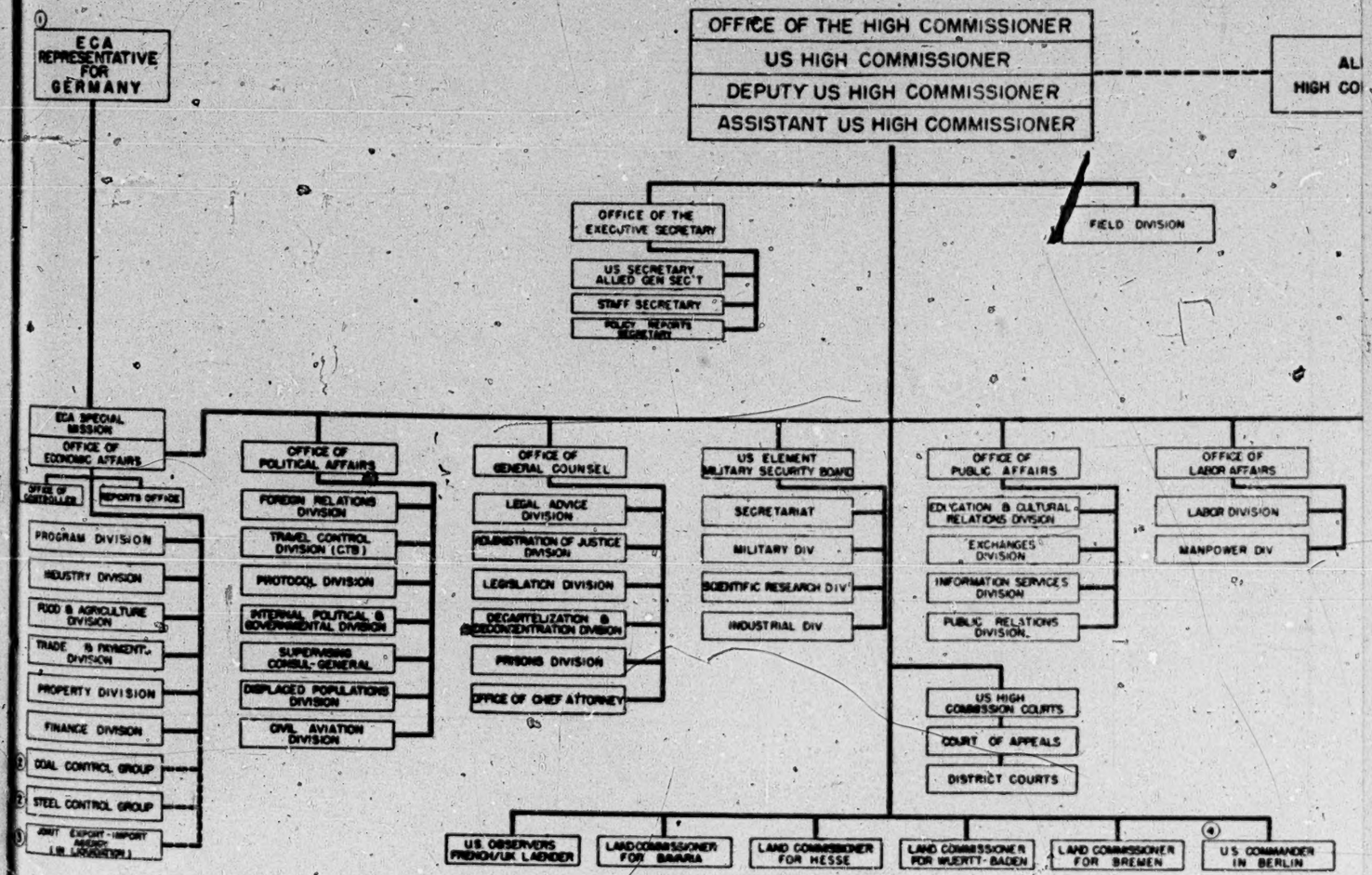
4. Transfer of funds, records, supplies and equipment from the Office of Military Government for Germany (U. S.) and appointment of personnel to the Office of the U. S. High Commissioner for Germany shall be accomplished as appropriate and are not effected by the terms of this announcement.

JOHN J. MCCLOY
U. S. High Commissioner
for Germany

Attachments: 3 Charts

1. Office of the U. S. High Commissioner for Germany
2. Office of Land Commissioner (prototype)
3. Berlin Element, Office of the U. S. High Commissioner for Germany.

ORGANIZATION CHART
OFFICE OF THE
US HIGH COMMISSIONER FOR GERMANY



(1) ECA REPRESENTATIVE FOR GERMANY - BY EXECUTIVE ORDER, MR JOHN J McCLOY, THE US HIGH COMMISSIONER FOR GERMANY, ALSO SERVES AS ECA REPRESENTATIVE FOR GERMANY UNDER THE IMMEDIATE SUPERVISION OF THE ADMINISTRATOR FOR ECONOMIC COOPERATION AND IN COORDINATION WITH THE US SPECIAL REPRESENTATIVE FOR EUROPE ON PROJECT, HOWEVER, TO CONSULTATION WITH AND ULTIMATE DIRECTION BY THE PRESIDENT.)

(2) US ELEMENTS, COAL CONTROL GROUP AND STEEL CONTROL GROUP, RECEIVE POLICY GUIDANCE FROM DIRECTOR OF ECONOMIC AFFAIRS, FOR TRANSITIVE ACTIVITIES. THE GROUPS ARE RESPONSIBLE TO THE ECONOMICS COMMITTEE, ALLIED HIGH COMMISSION.

(3) US ELEMENT RECEIVES POLICY GUIDANCE FROM DIRECTOR ECONOMIC AFFAIRS; AGENCY IS ADMINISTRATIVELY RESPONSIBLE TO FOREIGN TRADE AND EXCHANGE COMMITTEE, ALLIED HIGH COMMISSION, DURING LIQUIDATION.

(4) THE US COMMANDER, BERLIN SERVES AS THE REPRESENTATIVE IN BERLIN OF THE US HIGH COMMISSIONER FOR GERMANY, FOR MILITARY MATTERS HE REPORTS TO THE COMMANDER-IN-CHIEF, EUROPEAN COMMAND

Respondent's Exhibit 2

EXTRACT COPY

OFFICE OF THE U. S. HIGH COMMISSIONER
FOR GERMANY
APO 757

STAFF ANNOUNCEMENT

NO. 5 21 September 1949

ORGANIZATION AND FUNCTIONS OF THE UNITED STATES COURTS FOR GERMANY

I. PURPOSE. The functions and organization of the United States Courts for Germany, as established by Staff Announcement No. 1, are defined in the following paragraphs.

II. GENERAL STATEMENT OF FUNCTIONS.

1. The United States Courts for Germany (established as the United States Military Government Courts for Germany pursuant to Military Government Ordinance No. 31) form an independent judicial unit responsible directly to the United States High Commissioner. The integrated system provides for district judges and magistrates at the district court level and for a Chief Judge and associate judges of the Court of Appeals.

2. The United States Courts for Germany shall exercise the review functions set forth in Article 69 of Military Government Law No. 59.

3. For certain purposes, such as the selection of personnel, the planning for personnel requirements, and the submission of recommendations regarding the revision of legislation, the United States Courts for Germany function in coordination with the Office of General Counsel.

JOHN J. MCCLOY
U. S. High Commissioner
for Germany

Respondent's Exhibit 3

EXTRACT COPY

OFFICE OF THE U. S. HIGH COMMISSIONER
FOR GERMANY
APO 757

STAFF ANNOUNCEMENT

NO: 6 21 September 1949

ORGANIZATION AND FUNCTIONS OF THE OFFICE OF GENERAL COUNSEL

I. PURPOSE. The functions and organization of the Office of General Counsel, established by Staff Announcement No. 1, are defined in the following paragraphs.

II. GENERAL STATEMENT OF FUNCTIONS.

1. . . . . .

2. The Office of General Counsel is composed of six Divisions and Offices under the direction of the General Counsel for the discharge of the foregoing responsibilities. The specific functions of each such Division and Office are hereinafter set forth.

* * * *

VI. OFFICE OF THE CHIEF ATTORNEY.

1. Through the respective District Attorneys, prepares and prosecutes all cases before the respective District Courts of the United States Courts for Germany.

2. Prepares and prosecutes all cases appealed to the Court of Appeals of such courts.

JOHN J. MCCLOY
U. S. High Commissioner
for Germany

Respondent's Exhibit 4

EXTRACT COPY

Headquarters, European Command, Berlin, Office of the Commander-in-Chief, APO 742, US Army, 11 December 1948

TO: Chief Attorney, United States Military Government Courts for Germany, APO 696-A, US Army

Authorization is hereby given for trial of any dependent of a member of the United States Armed Forces or of any dependent of a civilian employee of the Department of the Army for any non-military offenses before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters has directed trial by Court Martial.

BY COMMAND OF GENERAL CLAY:

G. H. GARDE
Lieutenant Colonel, AGD
Assistant Adjutant General

2 Incls n/c
Telephone BERLIN 42456

EXCERPT FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS

(R. 71-74)

MR. THOMPSON: Now, Your Honor, there are certain documents which we would like to have entered in the case:

We would like to show the file is before the Court, Your Honor, for one thing.

I believe it is a customary requirement, in habeas corpus proceedings for the proceedings in the Court

which tried the petitioner to be filed, either with the petition or with the answer or return. That was not done in this case heretofore because the record was in Germany and it took some time to get the record certified and get it here.

THE COURT: I think it depends, Mr. Thompson, on whether or not there has been an allegation, by any denial of any constitutional right, which is apparent in these proceedings.

Is there any such allegation?

MR. THOMPSON: Your Honor, I don't understand that there is any.

We have the record here.

It is somewhat voluminous. I hesitate to encumber the record with it, but we do have it here if anyone wishes it to be filed: the record in the lower Court, I suppose you call it, and appeal to the Appellate Court, set up in connection with this Military Court.

THE COURT: If any of these proceedings are drawn in question, either by the pleadings, or argument, or testimony, then the Court will permit the proceedings to be made a matter of record; otherwise, it seems to me it would simply make a big record here, where one isn't necessary.

What is your idea, Mr. Robinson, on that?

MR. ROBINSON: Your Honor, I don't think we will need this record.

It is my desire to keep this record down to a minimum. We don't know, at this time, what the outcome of this case is going to be but, certainly, from the standpoint of my client, the expense involved is a very important item.

We wouldn't want this lengthy record of the trial introduced here, unless it is actually necessary, and we object to it.

MR. THOMPSON: If it doesn't become apparent, as the Court suggested, that it has any relevancy in this particular proceedings; but if, later, it should become relevant, then it may be filed at that time.

THE COURT: That is right, or such parts of it as do have a bearing.

MR. THOMPSON: Your Honor, we would like to ask Mr. Robinson to clarify this point in the petition—while Mr. Robinson is speaking on the point: there is this allegation at the end of "Paragraph 4:"

> "***and, in fact, the proceedings against her in said tribunal, before, during and after the trial, were conducted in contravention of the express mandates of the Constitution and laws of the United States and without regard to due process of law under the American Judicial system."

Now, if Mr. Robinson will clarify what he means by that?

We assume he doesn't question the regularity of the proceedings in this Court, under the Rules of that Court and that he is not questioning what the Rules are, as set down in Ordinance 31, as referred to before and argued before the Court.

THE COURT: I take it, unless the stipulation of facts includes something that is intended to bear out that allegation, that the traverse of the respondent is sufficient refutation. The petition is filed: it is traversed.

MR. THOMPSON: We filed a return; they traversed our return.

THE COURT: All right, the return of the respondent, then, denying that part of the petition is sufficient unless there is some fact introduced which shows that the contention is still made and that is what I had reference to: if such facts are introduced, even in argument, then the Court will permit the record to be referred to.

Respondent's Exhibit 5

THE AXIS IN DEFEAT

A Collection of Documents on American Policy Toward Germany and Japan

THE DEPARTMENT OF STATE

(P. 23-24)

ACT OF MILITARY SURRENDER
May 8, 1945

1. We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force and simultaneously to the Supreme High Command of the Red Army all forces on land, at sea, and in the air who are at this date under German control.

2. The German High Command will at once issue orders to all German military, naval and air authorities and to all forces under German control to cease active operations at 2301 hours Central European time on 8th May 1945, to remain in the positions occupied at that time and to disarm completely, handing over their weapons and equipment to the local allied commanders or officers designated by Representatives of the Allied Supreme Commands. No ship, vessel, or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment, and also to machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general.

3. The German High Command will at once issue to the appropriate commanders, and ensure the carrying out of any further orders issued by the Supreme Commander, Allied Expeditionary Force and by the Supreme High Command of the Red Army.

4. This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to GERMANY and the German armed forces as a whole.

5. In the event of the German High Command or any of the forces under their control failing to act in accordance with this Act of Surrender, the Supreme Commander, Allied Expeditionary Force and the Supreme High Command of the Red Army will take such punitive or other action as they deem appropriate.

6. This Act is drawn up in the English, Russian and German languages. The English and Russian are the only authentic texts.

Signed at Berlin on the 8. day of May, 1945

FRIEDEBURG KEITEL STUMPF

On behalf of the German High Command

IN THE PRESENCE OF:

On behalf of the
Supreme Commander
Allied Expeditionary
Force
A. W. TEDDER

On behalf of the
Supreme High Command
of the Red Army
G. ZHUKOV

At the signing also were present as witnesses:

F. DE LATTRE-TASSIGNY
General Commanding in Chief
First French Army

CARL SPAATZ
General, Commanding
United States Strategic Air Forces

(The Axis in Defeat—P. 62)

DECLARATION REGARDING DEFEAT OF GERMANY AND ASSUMPTION OF SUPREME AUTHORITY BY ALLIED POWERS [1]

June 5, 1945

THE GERMAN ARMED FORCES on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her.

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.

It is in these circumstances necessary, without prejudice to any subsequent decisions that may be taken respecting Germany, to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply.

The Representatives of the Supreme Commands of the

United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the French Republic, hereinafter called the "Allied Representatives," acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:—

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.

[1]Signed at 1800 hours, Berlin time, by Dwight D. Eisenhower, General of the Army, USA; Zhukov, Marshal of the Soviet Union; B. L. Montgomery, Field Marshal, Great Britain; De Lattre de Tassigny, General d'Armee, French Provisional Government.

(The Axis in Defeat—P. 68)

STATEMENT ON CONTROL MACHINERY IN GERMANY[1]

1. In the period when Germany is carrying out the basic requirements of unconditional surrender, supreme

[1]Made on June 5, 1945 by the Governments of the United States, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.

authority in Germany will be exercised, on instructions from their Governments, by the Soviet, British, United States, and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council. Each Commander-in-Chief will be assisted by a political adviser.

YVETTE J. MADSEN, *Petitioner*

v.

NINA KINSELLA, Warden, Federal Reformatory for Women, Alderson, West Virginia, *Respondent*

Habeas Corpus No. 1095

JOSEPH S. ROBINSON
745 Fifth Avenue
New York 22, New York

HARRINGTON & GRAHAM
(DAYTON M. HARRINGTON, ESQ.)
454 Washington Building
Washington 5, D. C.

JACKSON, KELLY, MORRISON & MOXLEY (JOHN C. MORRISON, ESQ.)
Kanawha Valley Building
Charleston, West Virginia
for Petitioner

A. GARNETT THOMPSON, ESQ.,
United States Attorney
Charleston, West Virginia

JOHN M. RAYMOND, COLONEL,
Assistant Legal Adviser
Department of State
Washington 25, D. C.

JOSEPH M. SWEENEY, ESQ.
Assistant to the Legal Adviser
Department of State
Washington 25, D. C.
for Respondent

BEN MOORE, *District Judge*

OPINION

On October 20, 1949, petitioner, being the wife of a Lieutenant serving in the American Army in the American Zone of Occupied Germany, and residing with her husband pursuant to military permission in Buchschleg, Kreis Frankfort, shot and killed her husband. She was tried before a tribunal originally known as a "United States Military Government Court for Germany," but whose name was later changed to the "United States Court of the Allied High Commission for Germany, Fourth Judicial District", which Military Government Court was created by an ordinance promulgated by the Department of the Army of the United States through the office of the Adjutant General. The crime with which she was charged was violation of Section 211 of the German Criminal Code, which defines the crime of murder and prescribes the penalty therefor. She was found guilty and, pursuant to Sections 51 and 44 of the same Code, ameliorating the punishment in certain cases, was sentenced to a term of fifteen years' confinement "in the Federal Reformatory for Women, Alderson, West Virginia, or elsewhere as the Secretary of the Army may direct."

On appeal to the Court of Appeals of the United States Courts of the Allied High Commission for Germany the conviction and sentence were affirmed; but the order of commitment was modified so as to provide that petitioner be committed "to the custody of the Attorney General of the United States or his authorized representative for

imprisonment for a term of fifteen (15) years from 20 October 1949."

Purusant to this commitment petitioner was confined in the Federal Reformatory for Women at Alderson, West Virginia, where she has since been in custody of the warden. She now seeks release by means of the writ of habeas corpus.

By Proclamation No. 2 of the Commanding General, United States Forces, European Theater, dated September 19, 1945, and addressed "To the German people in the United States Zone," it was declared in Article II thereof that "the German law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation" except as otherwise provided by Military Government or other competent authority. See 12 F.R. 212, p. 6997.

Pursuant to Military Government Ordinance No. 31, which became effective August 18, 1948, a system of courts known as United States Military Government Courts for Germany was established for the United States Zone. These courts superseded other military courts which had theretofore been functioning in that area. Article 3 of the ordinance provides for a District Court in each of eleven judicial districts, established in accordance with Article 2. Article 4 provides for a Court of Appeals. Under Article 7 the jurisdiction of District Courts is extended to "all persons in the United States Area of Control" (meaning the United States Zone of Occupation) "except persons, other than civilians, who are subject to military, naval or air force law and are serving with any forces of the United Nations." The Article contains the limitation that "No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command." It further

provides that District Courts shall have jurisdiction to hear and decide not only those cases arising under legislation of the Allied Control Council and the United States Military Government; but also cases involving offenses under German law in force in the Judicial District of the Court. Ordinance No. 32 furnishes a code of criminal procedure for these courts. See 14 F.R. 7, pp. 124-8.

On December 11, 1948, by a letter to the Chief Attorney, United States Military Government Courts for Germany, General Lucius D. Clay, Commander-in-Chief, European Command, authorized the trial of any dependent of a member of the United States Armed Forces before the appropriate Military Government Court established by Ordinance No. 31, unless trial by court-martial should be directed in a particular case.

United States Military Government in Germany was carried on under the Department of the Army from its inception until September 21, 1949. On that date, the Occupation Statute for Western Germany, agreed to by the governments of the United States, the United Kingdom and France, was declared to be in force, thus putting into effect the Charter of the Allied High Commission, also agreed to by those governments. The Allied High Commission thereby came into existence, replacing the Office of Military Government for Germany. This likewise effected a change of the Office of United States Military Governor to that of United States High Commissioner.

The Occupation Statute restored full judicial powers to the German people subject to certain reserved powers which embraced the protection, prestige, security and immunities of Allied Forces and dependents. The Statute further provided for the codification of legislation based upon the reserved powers, which legislation was to remain in force. See 14 F.R. 239, pp. 7456,7: Law No. 13

of the Allied High Commission, which became effective January 1, 1950, provided that German courts shall not exercise criminal jurisdiction over the Allied Forces. See 15 F.R. 38, pp. 1056,7. Law No. 2, effective September 21, 1949, defines the expression "Allied Forces," whenever used in legislation of the Allied High Commission, as including members of the families of members of the Occupation Forces. See 14 F.R. 239, p. 7457.

By Law No. 1 of the United States High Commissioner, effective January 1, 1950, the name of the courts established under Ordinance No. 31 was changed from "United States Military Government Courts for Germany" to "United States Courts of the Allied High Commission for Germany." See 15 F.R. 71, p. 2086. The composition of these courts was left unchanged, and their criminal jurisdiction, insofar as dependents of members of the Allied Forces were concerned, was the same as that which had been exercised prior to the Occupation Statute. As already stated, it was one of these courts which, on February 20, 1950, brought petitioner to trial and later convicted her of the crime with which she was charged.

It should be said at the outset that whenever a prisoner invoking the power of a federal court files a petition containing allegations which, if true, entitle him to his freedom, the Great Writ of habeas corpus is the appropriate means whereby the right is tested. If the decision depends on disputed facts, the function of the Court is simple. The Court merely determines from the evidence what the facts are and renders judgment accordingly, the law not being in dispute.

On the other hand, in cases such as we have here, the Court faces a harder task. Petitioner and respondent are in complete agreement on the facts. Petitioner's challenge of the government's right to hold her in custody raises legal questions only; but it probes deeply into fundamental principles concerning limitations on executive

and judicial power, and involves also the interpretation of important constitutional and statutory provisions.

These questions should be resolved by the Court only so far as they concern the rights of petitioner, but insofar as they do affect those rights, it is the duty of the Court to consider them fully and without regard to how the answers may impinge upon other persons or situations. The right of one illegally detained to be discharged from custody upon establishing the unlawful character of the detention is a right which must be granted though the full power, policy and governmental machinery of the State or Nation be arrayed in an effort to retain that custody.

Proceeding, therefore, to examine the problems presented, we find that petitioner's substantial contentions are as follows:

First, that the court by which she was tried and sentenced was lacking in jurisdiction to try anyone (especially any American citizen) because it was not established nor were its judges appointed by any authority known to the American Constitution or to the common law of war.

Secondly, that if it should be held that the court had jurisdiction to try American citizens, yet it had no such jurisdiction to try them for violations of German law, nor to deny to them any of the rights guaranteed by the Constitution of the United States to its citizens when tried in its courts.

Thirdly, that petitioner is one of a class of persons who, by the provisions of the Articles of war, is subject to the exclusive jurisdiction of courts-martial.

Aside from a rather technical argument that an American citizen convicted abroad of an offense against the laws of a foreign country cannot legally be confined in

a United States penitentiary, the foregoing are the only grounds urged by petitioner for her release.

The Constitution of the United States is the supreme law of the land, in war as well as in peace. However, its guaranties have no extra-territorial scope. When an American citizen (not a member of the Armed Forces) enters a foreign country, he becomes amenable to the laws of that country, and is triable by its courts, whose procedure may or may not be in conformity with American concepts of justice and fair play.

It may happen, as was the case with Germany, that unconditional surrender to a conquering army completely wipes out local sovereignty, leaving the territory of the conquered nation, pending a treaty of peace, without any body of enforceable law save that which may be imposed by the conqueror. The power, as well as the duty, then devolves upon the conquering nation, through the commander-in-chief of its occupying army, to provide a government to take the place of that which has been overthrown. One of the essential functions of this substitute government is to enact or adopt and administer a body or code of criminal laws. Historically and according to the law of war this is accomplished through decrees of the military commander-in-chief, establishing the law, framing the system of courts, prescribing rules of procedure, and appointing the judges.

The power of the United States thus to govern a conquered and occupied country does not stem from any explicit provision of the Federal Constitution. It is, however, implicit in the words of that instrument which make the President the commander-in-chief of the army and navy. Congress is vested by the Constitution with the power to declare war, and to raise and support armies; but the President, as commander-in-chief, is given the power to wage the war which Congress has declared. *Ex parte Quirin*, 317 U.S. 1, 26; Winthrop,

Military Law and Precedents, (2nd Ed. 1920 Reprint), p. 831.

To establish and maintain civil government in a conquered country is certainly a function which grows out of the power to wage war. The situation in Germany is unusual in that the occupation has lasted more than five years; there is still no treaty of peace; and the occupying force still exercises all governmental functions which have not been restored to the German people by the Occupation Statute of September 21, 1949; yet despite this prolongation, the status remains that of a temporary occupation of conquered territory, and the relationships of all persons within its boundaries are fixed and determined by the law of war.

The chain of authority whereby the Military Government Courts were established and their jurisdiction delineated is clear. The Allied Powers, having conquered Germany, announced on June 5, 1945, their assumption of supreme authority within that country. This was followed on July 14, 1945, by a proclamation of General of the Army Dwight D. Eisenhower establishing a military government in the United States Zone. See 12 F.R. 212, p. 6997. Then came in succession Proclamation No. 2, Military Government Ordinances Nos. 31 and 32, the Occupation Statute, Laws Nos. 2 and 13 thereunder, and finally Law No. 1 of the United States High Commissioner changing the name of the courts. These acts of military legislation provided for every detail of the creation, composition, jurisdiction and procedure of the occupation courts.

I am not impressed by petitioner's argument that there was a change in the nature or power of the court merely because, prior to the effective date of the Occupation Statute, the system of which it was a part operated under orders of the Department of the Army, but was afterwards carried on through the Department of State. It

makes no difference through what agency he may act; the President is still commander-in-chief, and as such vested with power to continue the military government during the transition period between the cessation of hostilities and the treaty of peace. It is worthy of note that the Federal Constitution, from which the President's power as commander-in-chief is derived, makes no mention of separate departments of the government, nor does it limit him in the exercise of the powers which go with the office of military commander-in-chief.

I conclude that petitioner is one of a class jurisdiction over which was reserved by the Occupation Statute; and that the court which tried her had jurisdiction of her person, unless by the Articles of War such jurisdiction was vested exclusively in courts-martial, a question which will be later discussed.

The trial court also had jurisdiction of the subject matter. It is argued by respondent that because Proclamation No. 2, making German law applicable throughout the United States Zone of Occupation, was addressed to the German people, it could therefore have no application to American citizens. This contention is without merit. It is clear that the purpose of Proclamation No. 2 was to give German law a territorial, not an ethnological, application. It was not essential to its effectiveness that it be addressed to any particular group of people. It was sufficient that it be announced publicly as a decree of the commanding general. Moreover, we are not confined to Proclamation No. 2 in seeking and finding authority for the trial of American citizens for violation of German laws. Ordinance No. 2, whereby the predecessors of the later Military Government Courts were established in occupied Germany on November 10, 1946, (See 12 F.R. 66, pp. 2190,1), gives those courts jurisdiction over "all offences under the laws of the occupied territory or of any part thereof," and Ordinance No. 31, creating the

court which tried petitioner, gives it jurisdiction of "offenses under German law in force in the Judicial District of the Court." There is no restriction of the jurisdiction to German citizens, and no exemption therefrom of American citizens.

If American citizens in occupied Germany (not under military law) were not subject to German criminal laws, what law or system of laws would control their actions? Not being under military law, they could not be required to obey the Articles of War; no criminal laws for the governance of occupied Germany other than the German criminal laws have been promulgated by the occupying authorities; so, if the criminal laws of Germany were not made applicable to non-military American citizens residing in that occupied country, as well as to the German people, we should behold the absurd spectacle of a class of persons licensed to commit all manner of crimes with impunity, because no criminal laws exist to which they are answerable.

Nor was it improper for the Military Government to authorize a code of criminal procedure which differed from that prescribed for courts-martial in the Articles of War. As we have seen, these military tribunals are created pursuant to the President's power to wage the war which Congress has declared. It cannot be said that they are necessarily to be governed in procedural matters by the provisions of the Articles of War enacted to guide trials by court-martial. The President has independent power to establish such rules of procedure as he may see fit.

It is therefore clear that petitioner's American citizenship did not immunize her from trial for a violation of the German statute against murder.

As to petitioner's complaint that she was deprived of certain rights guaranteed by the Bill of Rights of the

United States Constitution, it is sufficient to say that the law has long been settled that these guaranties do not apply to citizens of the United States living or sojourning in a foreign country who are brought to trial in that country on charges of violating local laws. *In re Ross,* 140 U. S. 453; *Dorr* v. *United States,* 195 U.S. 138; *Balzac* v. *Porto Rico,* 258 U. S. 298; *In re Bush,* Habeas Corpus No. 3544, (unpublished), D.C. D.C., June 29, 1949. The *Balzac* and *Dorr* cases were both concerned with the question of whether Constitutional guaranties were effective in territories acquired by the United States, but not yet incorporated as a part thereof. It was held in those cases that the guaranties were not applicable, the Court saying in the *Dorr* case (at p. 149):

> "We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, §3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated."

Since the Bill of Rights of the Federal Constitution is inoperative with respect to legal proceedings in territory owned by the United States; though not officially absorbed into its corporate body, *a fortiori* these guaranties do not control a trial such as petitioner underwent.

It was stated in argument that the chief contention of petitioner is that courts-martial of the United States Army of Occupation had exclusive jurisdiction to try her, and that the trial in such case must have been for a violation of the Articles of War and must have been conducted according to the procedure prescribed by the

Articles of War. The basis of this contention is that Article 2 of the Articles of War, bringing under military law persons "accompanying" the army in a foreign country or in the field in time of war, is applicable to petitioner as the wife of an army officer residing with him at an Army Post in occupied Germany.

Prior to the year 1916 Article 2 of the Articles of War did not extend to persons accompanying the army. This class of persons was made subject to military law by an amendment adopted in that year. Congress, by Article 15 of the Articles of War, enacted simultaneously with the amendment to Article 2, provided as follows:

> "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war be lawfully triable by such military commissions, provost courts, or other military tribunals."

These two articles, with some slight changes in the language of Article 15 not material here, have been in effect since 1916.

Petitioner recognizes that concurrent jurisdiction was by Article 15 reserved to military commissions and other military tribunals to try certain classes of offenders and offenses; but she maintains that this jurisdiction was confined to persons who by statute are made amenable to such commissions or who commit offenses against the laws of war; that is, offenses such as relieving or communicating with the enemy; carrying on illicit trade or intercourse; spying, pilferage; or abusing prisoners. In my opinion, this interpretation of the language reserving jurisdiction to military commissions and tribunals is much too narrow. Offenses which by the *law* of war are triable by military commissions and other military tri-

bunals include offenses against the *laws* of war, but are not confined to such offenses. The law of war, as defined by Winthrop, comprises "those principles and usages which, in time of war, define the status and relations not only of enemies—whether or not in arms—but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorizes their trial and punishment when offenders." Winthrop, p. 773. It is under the law of war, as thus defined, that military tribunals such as the court which tried petitioner are created, and it is in accordance therewith that their jurisdiction is defined. The law of war imposes upon an occupying army the obligation to furnish the inhabitants of the country with a system of laws and courts; and since the power must be coextensive with the obligation, the jurisdiction of the military courts or commissions which are set up by the occupying army extends to whatever matters may be committed to such tribunals by the commander-in-chief of the occupation force. This construction is one which has long been recognized, as is witnessed by the following excerpt from an opinion of the Judge Advocate General of the Army, reported in *Digest of Opinions of the Judge Advocates General* (1912 edition) at page 1067:

> "The jurisdiction of the military commission is derived primarily and mainly from the law of war; . . . Military commissions are authorized by the laws (sic) of war to exercise jurisdiction over two classes of offenses, committed, whether by civilians or military persons, either (1) in the enemy's country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theater of war, in which *martial law* has been established by competent authority. The two classes of offenses are: I. Violations of the laws of war. II. Civil crimes, which, because the civil authority is superseded by the

military and the civil courts are closed or their functions suspended, can not be taken cognizance of by the ordinary tribunals."

The reservation of jurisdiction to military commissions and other military tribunals by Article 15 of the Articles of War was therefore plenary in its scope. They were not deprived of any jurisdiction which they could theretofore lawfully exercise. The only question to be decided in this connection is: Did military commissions and other military tribunals prior to the year 1916 have jurisdiction to try the wife of a soldier residing with her husband in an occupied foreign country?

No case has been brought to my attention involving the trial of a soldier's wife by a military commission; but no difference is perceived between her status prior to the 1916 amendment and that of any other civilian who might be accompanying the army although not connected with it in any of its activities; and since military tribunals undoubtedly had jurisdiction to try such other persons for violations of local criminal laws, this jurisdiction would necessarily extend to the wives of soldiers. It is true that some support may be found in Winthrop's treatise for the theory that wives who accompanied their soldier husbands were to be regarded as "retainers to the camp" (See Winthrop, p. 99, note 94); but this conception of a wife's function, which may have been tenable in more primitive times, had certainly lost its force long prior to the year 1916. No one, being realistic, could say that at that time a wife who accompanied her husband on a tour of duty in the army was a "retainer to the camp."

Moreover, the inclusion of retainers to the camp and persons accompanying or serving with the armies of the United States in those classes of persons who are subject to military law was not made by Congress for the purpose of extending protection or immunity to such persons. The army in time of war, and particularly while

on foreign soil, needs a swift and efficacious means of dealing with all persons who are connected with it in any way. "All delays are dangerous in war." It is for the better discipline of the army and the more efficient conduct of military operations that Article 2 of the Articles of War brings under military law certain classes of persons who are not soldiers in the army. There is no indication anywhere in the Articles of War that these persons are not subject as well to the concurrent jurisdiction of military commissions or other military tribunals when such tribunals have been established in occupied countries and vested with jurisdiction to enforce local laws.

I am of opinion therefore that prior to the 1916 Amendments to the Articles of War, the wives of soldiers in occupied foreign territory who committed crimes against local laws which military commissions or tribunals had been set up to administer were triable by such military tribunals; and that Article 15 effectively reserved jurisdiction to such tribunals to try and punish such persons.

I do not find it necessary to decide whether or not petitioner, as the wife of a soldier, is properly classified as a person "accompanying" the army. It is not admitted by respondent that she ought to be so classified, but if not so classified, she was at least a dependent of an army officer. It will be readily noted that if she is properly classified as a person "accompanying" the army, and therefore subject to military law, then the military court which tried her had concurrent jurisdiction, while if she is to be classed as a civilian dependent of an army officer but not subject to military law, then that court had exclusive jurisdiction. Therefore, her classification becomes immaterial.

Finally, it is petitioner's claim that she was improperly committed to the custody of the Attorney General of the United States for imprisonment in a penitentiary, because commitment to the Attorney General's custody is

authorized only for those persons convicted of offenses against the United States (citing 18 U.S.C. 4082), whereas petitioner was convicted of an offense under the German Criminal Code. It is enough to say that the statute here applicable is 10 U.S.C. 1452, which provides that "Persons sentenced to confinement upon conviction by courts-martial or other military tribunals of crimes or offenses which, under some statute of the United States or under some law of the State, Territory, District, or other jurisdiction in which the crime or offense may be committed, are punishable by confinement in a penitentiary . . . may be confined . . . in any United States, State, Territorial, or District penitentiary, or in any other penitentiary directly or indirectly under the jurisdiction of the United States . . . " It is clear that the clause "or other jurisdiction in which the crime or offense may be committed" widens the territorial orbit of applicability of the statute so as to embrace United States citizens tried and convicted by courts established abroad under the authority of the United States, such as was the military tribunal which tried and convicted petitioner. Inasmuch as 10 U.S.C. 1452 does not designate the person to whose custody one convicted by a military tribunal is to be committed, I think it was proper that the Court of Appeals place petitioner in the custody of the Attorney General, pursuant to a directive to that effect of the Secretary of State of the United States.

Petitioner has alleged no fact which warrants her release. Therefore an order will be entered remanding her to the custody of the Attorney General.

(Signed) BEN MOORE
United States District Judge

September 8, 1950.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

In the Matter of the Petition of	Habeas
ARTHUR CURTIS ANTRIM BUSH	Corpus
For Writ of Habeas Corpus.	No. 3544

Washington, D. C.,
Wednesday, June 29, 1949.

. . . . . .

Opinion

THE COURT (HOLTZOFF, J.): This is a petition for a writ of habeas corpus presented in behalf of a civilian citizen of the United States who was arrested in Japan and convicted by an American general provost court in Japan on a charge of unlawfully disposing of certain Government property. . . .

The first objection raised to the validity of the conviction pursuant to which petitioner is imprisoned is that the provost court had no jurisdiction of the person of the petitioner in respect to the crime with which he was charged. At the time the offense is alleged to have been committed, the petitioner concededly was a civilian employee of the Army and, therefore, under the Articles of War was subject to court-martial jurisdiction. Prior to his arrest, however, he had resigned from his Army employment, and under the recent decision of the Supreme Court in the *Hirshberg* case courts-martial lost jurisdiction over him. He was tried, however, before a general provost court and not by a court-martial.

As was indicated in my remarks in this case on the motion to dismiss the petition, provost courts are American military tribunals created in Japan by the United States Army for the trial of offenses committed by

American nationals. While ordinarily military personnel are not tried by provost courts, but are tried by courts-martial, the Court is, nevertheless, of the opinion that provost courts have in law concurrent jurisdiction with courts-martial over military personnel. The Court reaches this conclusion on the following basis and for the following reasons.

Provost courts are created primarily for the trial of civilians charged with the commission of crimes within the territorial jurisdiction of the provost courts in areas subject to military law. But it is well recognized that civilian tribunals—that is, civil courts—have concurrent jurisdiction with courts-martial over military personnel. It seems to the Court that by analogy provost courts, which were created primarily for the trial of civilians, have in law concurrent jurisdiction with courts-martial over military personnel. To be sure, it is not customary to use provost courts for that purpose. This circumstance does not detract from the fact that jurisdiction exists, even though it may not be frequently invoked. Consequently, the Court reaches the conclusion that the provost court throughout had concurrent jurisdiction over this petitioner. When the petitioner ceased to be subject to court-martial jurisdiction, provost courts had sole jurisdiction over the person of the petitioner. The Court, therefore, is bound to reject the contention of the petitioner that provost courts had no jurisdiction over the petitioner when the crime was committed and could not thereafter acquire jurisdiction, after the petitioner ceased to be subject to the Articles of War.

The next point advanced by the petitioner is the contention that provost courts are unconstitutional tribunals as respects citizens of the United States, in that they make no provision for indictment by grand jury and a trial by jury. It is argued that the petitioner has been deprived of these two basic constitutional rights and

that, therefore, the judgment of conviction is void and should be set aside. This raises a very fundamental and basic question, namely, whether the guarantees of the Bill of Rights are applicable to citizens of the United States before a tribunal of the United States sitting outside the United States.

It has been said time and time again that the Constitution does not follow the Flag everywhere. For example, there are no grand juries in the Canal Zone and there are none in the Virgin Islands, because neither the Canal Zone nor the Virgin Islands is an organized territory of the United States. Consular courts and other extraterritorial courts, such as the United States Court of China, which at one time were functioning in the Orient, with jurisdiction to try citizens of the United States charged with committing crimes in those countries, always functioned without a grand jury and frequently without a jury. This procedure has been approved by the Supreme Court. *In re Ross*, 140 U.S. 453, 464. In the case just mentioned, Mr. Justice Field stated:

> "The Constitution can have no operation in another country."

The Court might add that recently it was held that the Fourth Amendment does not extend to citizens of the United States in foreign countries. *United States* v. *Best*, 76 Federal Supplement, 857, 864. Not only the authorities but also the history of this aspect of our jurisprudence inescapably leads to the conclusion that the Bill of Rights does not apply to trials conducted outside the United States. Moreover, it has always been consistently held that the provisions of the Bill of Rights relating to indictment by grand jury and to trial by jury do not apply to military tribunals operating either under the Articles of War or under the laws of war or international law.

The Court reaches the conclusion, therefore, that the petitioner has not been deprived of any constitutional rights. Beyond examining the jurisdiction of the military tribunal this Court may not go. Any errors at the trial, any alleged insufficiency of evidence, any alleged insufficiency of charges, or any other matters dealing with occurrences at the trial are not subject to review by a writ of habeas corpus. In habeas corpus proceedings, the only matters that may be considered are the jurisdiction of the court in which the petitioner was tried and, further, the question whether he was deprived of any constitutional rights in the course of his trial.

In the light of the considerations that have just been discussed, the Court reaches the conclusion that the petition for a writ of habeas corpus should be denied.

Extract from Opinion of Court of Appeals of United States Military Courts for Germany Appearing in I Court of Appeals Reports, Pages 207, 208, 211, 224, 226-227, and 232.

UNITED STATES MILITARY GOVERNMENT
COURTS FOR THE UNITED STATES
AREA OF CONTROL IN GERMANY

UNITED STATES MILITARY GOVERNMENT
v. WILMA BAKER YBARBO

Case No. 52 Opinion No. 19

Argued 1 March 1949

Decided 14 March 1949

Before—CLARK, Chief Judge, and GOODMAN, FULGHUM, ROBINSON, and SEDILLO, Associate Judges.

CLARK, Chief Judge, delivered the Opinion of the Court.

The Military Government charged the defendant appellant with killing her husband, a Sergeant in the Mili-

tary Police. She admitted firing the fatal shots, but claimed that they were fired in self-defense. The charges were laid under Section 7 of Article I of Military Government Ordinance No.1[1] and under Section 211 of the Germant Criminal Code.[2] The case was tried by a three judge court[3] sitting as the District Court for the Third Judicial District of the Military Government Court System. The crime alleged was committed at Fritzlar in that district.

The court, after a trial lasting ten days, found the defendant guilty under the Ordinance and under Section 212 of the German Criminal Code (the charge was so amended), and sentenced her to 20 years imprisonment on each charge, the sentences to run concurrently. She, as is her right,[4] now appeals to this Court. In both the trial court and in this Court, the defendant was represented by able United States counsel. She had every opportunity and did consult with said counsel in preparing her trial, during the trial and in preparation of this appeal.

The appellant makes certain legal objections which, if valid, vitiate the entire proceedings in the court below. They must, accordingly, be considered in limine. She says that she has been tried in the wrong court and under the wrong law.

. . . . . .

The defendant's claims that she has been tried by the wrong court and by the wrong law are in reality only one claim. They depend upon the answer to a single question: If the appellant may only be tried by court martial, the only law applicable to her is found in that enactment of the Congress known as the Articles of War.

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[1] Military Government Regulations 23-214.

[2] The Statutory Criminal Law of Germany, War Department Pamphlet No. 31-122, p. 140.

[3] Military Government Ordinance No. 31, Art. 3, Sec. 5.

[4] Ibid, Art. 12, Sec. 4.

If, on the other hand, the jurisdiction of a court martial over her is not exclusive, she can be tried by such court and by such law as the Military Governor in Germany may prescribe and ordain.

. . . . . .

We have reached the conclusion that a court martial and the law applicable therein is not the only court and not the only law in which and by which the defendant can be tried. It will be conceded that the Military Governor has the right to establish other courts and prescribe other laws for that purpose. The Military Governor in Germany has followed the traditional practice of other Military Governors whose duty it has been to command occupation forces. He has established military tribunals in one of which the defendant has had her trial. The various commanders of the U. S. Occupying Forces in history have not always followed a uniform practice with respect to the law ordained by them for the military tribunals. General Kearney, for instance, in Mexico established his own code. General Brook, on the other hand, in Cuba accepted the Cuban law. The Military Governor in Germany has followed the practice of General Brook and has ordained that the law applicable to U. S. civilians charged with crime is the German Criminal Code."

. . . . . .

In prescribing the German law, the Military Governor has acted in accord with (1) what the Supreme Court in an early case arising out of the occupation of Mexico called "enlightened policy";[97] (2) with the principles of the conflict of law;[98] and (3) with international law.[99] It will be conceded that by the law of nations an occupying power has only the right to interfere with the

[97] M. G. Ordinance No. 31, Art. VII, Sec. 2c.
[98] Fleming v. Page (1850), 13 L. Ed. 278.
[99] Restatement of Conflicts of Law, Sec. 377.
[100] Oppenheim, Vol. II, 349.

law of the occupied territory. If such interference is necessary in the interests of public order and safety. This conception has received the sanction of Article 43 of the Hague Convention."[102] It may be observed that to try Americans and Germans in the same court by different sets of laws is certainly no way to teach the democracy stated to be a principal object of the occupation."[103] The conflicts of law have since the earliest times recognized the rule that where you act, by the law of that place are you punished.[104] As we have seen, law is territorial. The safety of the occupying forces is amply secured by the enforcement of the German Criminal Code. The crimes are well defined and the punishments adequate.

. . . . . .

The finding of guilty under the first charge is reversed and the sentence imposed under it set aside.

The finding of guilty under the alternate first charge is upheld but the sentence thereon reduced to five (5) years imprisonment, beginning on the 21st of September 1948.

IT IS SO ORDERED:

Military Government—Ordinance No. 2; Military Government Courts—(12 Federal Register 2190)

"*Article I; kinds of military courts.* (1) General Military Courts.

"(2) Intermediate Military Courts.

"(3) Summary Military Courts.

"*Article II; jurisdiction.* (1) Military Government courts shall have jurisdiction over all persons in the

[101] Ibid.

[102] Military Government Regulations 1-301 and 302.

[103] Hunt Report (1920) Chapter V.

occupied territory except persons other than civilians who are subject to military, naval or air force law and are serving under the command of the Supreme Commander, Allied Expeditionary Force, or any other Commander of any forces of the United Nations.

"(2) Military Government Courts shall have jurisdiction over:

"(i) All offences against the laws and usages of war.

"(ii) All offences under any proclamation, law ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

"(iii) All offences under the laws of the occupied territory or of any part thereof."

. . . . . .

"*Article V; rights of accused.* (1) Every person accused before a Military Government Court shall be entitled:

"(i) To have in advance of trial a copy of the charges upon which he is to be tried;

"(ii) To be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice;

"(iii) To consult a lawyer before trial and to conduct his own defense or to be represented at the trial by a lawyer of his own choice, subject to the right of the court to debar any person from appearing before the court;

"(iv) In any case in which a sentence of death may be imposed, to be represented by an officer of the Allied Forces, if he is not otherwise represented;

"(v) To bring with him to his trial such material

witnesses in his defense as he may wish, or to have them summoned by the court at his request, if practicable;

"(vi) To apply to the court for an adjournment where necessary to enable him to prepare his defense;

"(vii) To have the proceedings translated, when he is otherwise unable to understand the language in which they are conducted;"

. . . . . .

Military Government Law No. 2: German Courts (12 Federal Register 2191)

. . . . . .

"*Article VI; limitations on jurisdiction.* (1) Except when expressly authorized by Control Council or Military Government Law, ordinance or regulation, or by order of the Director of Military Government of the appropriate Land, no German court shall assert or exercise jurisdiction in the following cases or classes of cases:

"(i) Criminal cases involving:

"(a) Any of the United Nations, or

"(b) The Armed Forces of any of the United Nations, or

"(c) Any person serving with any such Forces or a dependent accompanying any of them, or

"(d) Any national of the United Nations, or

. . . . . ."

Military Government—United States Area of Control: Proclamation No. 1 (12 Federal Register 6997)

"To the People of Germany:

"I, General Dwight D. Eisenhower, Commanding General, United States Armed Forces in Europe, do hereby proclaim as follows:

"Article I. As announced on 5 June 1945, supreme authority with respect to Germany has been assumed

by the Governments of the United States, The United Kingdom, the Union of Socialist Soviet Republics, and the Provisional Government of the French Republic.

"Article II. The United States Zone of Occupation is occupied by United States Forces under my command and a Military Government under my authority is established therein. All persons in such Government Zone will obey immediately and without question all of the enactments and orders continued in effect or issued by me or under my authority.

. . . . . .

"Dated: 14 July 1945.

Dwight D. Eisenhower,
General of the Army, Commanding General of the United States Armed Forces in Europe."

Military Government—United States Area of Control: Proclamation No. 2 (12 Federal Register 6997)

"To the German people in the United States Zone:

"I, General Dwight D. Eisenhower, Commanding General, United States Forces, European Theater, do hereby proclaim as follows:

. . . . . .

"Article II. Except as heretofore abrogated, suspended or modified by Military Government or by the Control Council for Germany, the German law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation, until repealed by, or superseded by a new law enacted by the Military Government or the states hereby constituted or by other competent authority."

. . . . . .

"Dwight D. Eisenhower,
General of the Army, U.S.A., Commanding General, United States Forces, European Theater.
Dated: September 19, 1945."

(14 Federal Register 124-129)

NATIONAL MILITARY ESTABLISHMENT
DEPARTMENT OF THE ARMY

United States Military Government Courts for Germany

Creation and Organization; Codes of Procedure

. . . . . .

Ordinance No. 31; United States Military Government Courts For Germany; Creation of the Courts—(a) Article 1; Judicial System.

A system of courts is hereby established for the United States Area of Control of Germany, which term is defined as comprising the Laender of Bavaria, Bremen, Hesse, Wuerttemberg-Baden and the United States Sector of Berlin. The courts so created shall be known as United States Military Government Courts for Germany.

ORGANIZATION OF THE COURTS

(b) *Article 2; Judicial Districts.* The following judicial districts are hereby established within the United States Area of Control:

. . . . . .

Fourth Judicial District: Comprised of Kreise Bergstrasse, Buedingen, Darmstadt, Dieburg, Erbach, Frankfurt, Friedberg, Gelnhausen, Grossgerau, Hanau, Limburg, Maintaunus, Obertaunus, Offenbach, Rheingau, Schluechtern, Untertaunus, Usingen, Wiesbaden, all in Land Hesse;

. . . . . .

(c) *Article 3; District Courts.* (1) A District Court is hereby established for each judicial district within the United States Area of Control.

. . . . . .

(3) Each District Court shall consist of one or more istrict Judges and one or more Magistrates who shall singly except as provided in subparagraph (5) of this aragraph.

. . . . . .

(5) A District Court composed of three District udges or two District Judges and a Magistrate may ear and decide any civil or criminal case, and, in the tter, may impose any lawful sentence including death. majority of such Court shall decide any case before it, ovided that no sentence of death shall be imposed ex- pt by the unanimous decision of the Court.

. . . . . .

(7) In addition to or in lieu of any power of sentence rein authorized, a District Judge or a Magistrate may:

(i) Make such order concerning any property or busi- ss involved in an offense; or

(ii) Make such order concerning the person of the cused; as is authorized by law.

(8) Where an accused is charged with an offense der German law, the Court shall be limited to the sen- nce or other penal provision of such law.

. . . . . .

(d) *Article 4; Court of Appeals.* (1) A Court of Ap- als is hereby established for the United States Area Control.

. . . . . .

JURISDICTION OF THE COURTS

(g) *Article 7, Jurisdiction of District Courts in Crim- al Cases.* (1) District Courts shall have criminal juris- tion over all persons in the United States Area of Con- l except persons, other than civilians, who are subject military, naval or air force law and are serving with

any forces of the United Nations. No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command. No member of an Allied Mission, visiting governmental official, or person subject to the military law of any country other than the United States, shall be brought to trial for any offense except upon authorization of the Military Governor.

(2) District Courts shall have jurisdiction to hear and decide cases involving;

(i) Offenses under legislation issued by or under the authority of the Allied Control Council;

(ii) Offenses under United States Military Government Legislation;

(iii) Offenses under German law in force in the Judicial District of the Court.

. . . . . .

(j) *Article 10; Venue.* (1) The trial of all criminal cases, except as provided in subparagraph (3) of this paragraph, shall be by the District Court in the District in which the alleged offense was committed, unless a Judge of the Court of Appeals on application of the Chief Attorney directs that it be tried in the District where the accused was residing or stationed at the time the alleged offense was committed or in the District where the accused was arrested or imprisoned.

. . . . . .

(l) *Article 12; Jurisdiction of the Court of Appeals.* (1) The Court of Appeals shall have original jurisdiction to act on applications for release from confinement when the person is confined by virtue of a sentence of a Court composed of more than one Judge.

(2) The Court of Appeals shall have appellate jurisdiction to consider on appeal final orders of individual

Judges of the Court of Appeals and final judgment and orders of the District Judges except as provided in paragraph (i) (4) of this section. The appeal may include both questions of law and of fact except that, in dealing with questions of fact, the Court shall set aside or reverse the decision of the District Court in criminal cases only if the evidence does not support a finding of guilt beyond a reasonable doubt and in civil cases only if the evidence does not substantially support the judgment.

. . . . . .

(4) In any case in which a District Court has imposed a penalty of ten years or more, the Court of Appeals shall, upon application of the person or persons convicted grant leave to appeal.

. . . . . .

(7) Upon any appeal or review the Court of Appeals may reduce the sentence, vacate the findings in whole or in part, enter a judgment for the defendant or set the judgment, or findings and sentence aside and order a new trial, and issue any other order or orders appropriate in the circumstances. In any case on review under subparagraph (6) above, where a new trial is ordered and such new trial results in a conviction, the sentence may not be increased.

PERSONNEL OF THE COURTS

(m) *Article 13; Appointment and Removal.* (1) The Chief Judge and Associate Judges of the Court of Appeals and the Chief Attorney shall be appointed by the Military Governor upon the advice of his Legal Adviser. All other Judges and Magistrates shall be appointed by or under the authority of the Military Governor upon the advice of his Legal Adviser and the Chief Judge of the Court of Appeals. All Assistants to the Chief Attorney and all District Attorneys and their assistants shall be appointed by or under the authority of

the Military Governor upon the advice of his Legal Adviser and the Chief Attorney.

. . . . . .

Ordinance No. 32; code of criminal procedure for United States Military Government Courts for Germany—

. . . . . .

(d) *Article IV; Matters preliminary to trial.*

. . . . . .

(6) The Court before which the accused is to be tried shall inform the accused of his right to the aid of counsel in every stage of the proceedings and before any further proceedings are had.

(7) If the accused desires to procure and consult with counsel he shall be afforded a reasonable opportunity to do so. If he is unable to obtain counsel himself after making reasonable efforts to do so, the Court may, and in cases other than those before a Magistrate shall, appoint counsel for him and grant the accused a like opportunity to consult therewith, unless the accused waives this right.

(8) If the accused is charged with an offense for which the District Attorney is asking a death sentence, representation by counsel is mandatory and no proceedings shall be had until counsel has been procured or assigned.

Occupation Statute
(14 Federal Register 7456)

Declaration Concerning the Entry into Force of the Occupation Statute

"Whereas by letter dated 12 May 1949 the Military Governors and Commanders-in-Chief of the French, United States and British Zones of Germany, respectively informed the President of the Parliamentary Council at

Bonn that the Occupation Statute had been promulgated by them as of that date, and that, 'upon the convening of the legislative bodies provided for in the Basic Law and upon the election of the President and the election and appointment of the Chancellor and the Federal Ministers, respectively, in the manner provided for in the Basic Law, the Government of the Federal Republic of Germany will then be established and the Occupation Statute shall thereupon enter into force'; and

"Whereas the conditions aforesaid have been satisfied; and it is expedient formally to declare the entry into force of the Occupation Statute;

"Now, therefore, the Council of the Allied High Commission hereby declares that the Occupation Statute entered into force as from 21 September 1949.

"Done at Bonn, Petersberg, on 21 September 1949."

"A. Francois-Poncet,
French High Commissioner for Germany,

John J. McCloy,
U. S. High Commissioner for Germany,

B. H. Robertson,
U. K. High Commissioner for Germany."

Text of Occupation Statute Promulgated on the 12th May 1949 by the Military Governors and Commanders in Chief of the Western Zones

"In the exercise of the supreme authority which is retained by the Governments of France, the United States and the United Kingdom,

"We, General Pierre Koenig, Military Governor and Commander-in-Chief of the French Zone of Germany,

"General Lucius D. Clay, Military Governor and Commander-in-Chief of the United States Zone of Germany, and

"General Sir Brian Hubert Robertson, Military Governor and Commander-in-Chief of the British Zone of Germany,

"Do hereby jointly proclaim the following Occupation Statute:

"1. During the period in which it is necessary that the occupation continue, the Governments of France, the United States and the United Kingdom desire and intend that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation. The Federal State and the participating Laender shall have, subject only to the limitation in this Instrument, full legislative, executive and judicial powers in accordance with the Basic Law and with their respective constitutions.

"2. In order to ensure the accomplishment of the basic purposes of the occupation, powers in the following fields are specifically reserved, including the right to request and verify information and statistics needed by the occupation authorities:

. . . . . .

"(e) Protection, prestige, and security of Allied forces, dependents, employees and representatives, their immunities and satisfaction of occupation costs and their other requirements;

. . . . . .

"(i) Control of the care and treatment in German prisons of persons charged before or sentenced by the courts or tribunals of the occupying Powers or occupation authorities; over the carrying out of sentences imposed on them; and over questions of amnesty, pardon or release in relation to them.

"3. It is the hope and expectation of the Governments of France, the United States and the United Kingdom

that the occupation authorities will not have occasion to take action in fields other than those specifically reserved above. The occupation authorities, however, reserve the right, acting under instructions of their Governments, to resume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government in Germany or in pursuance of the international obligations of their Governments. Before so doing they will formally advise the appropriate German authorities of their decision and of the reasons therefor.

. . . . . .

"7. Legislation of the occupation authorities enacted before the effective date of the Basic Law shall remain in force until repealed or amended by the occupation authorities in accordance with the following provisions:

"(a) Legislation inconsistent with the foregoing will be repealed or amended to make it consistent herewith;

"(b) Legislation based upon the reserved powers, referred to in paragraph 2 above will be codified;

"(c) Legislation not referred to in (a) and (b) will be repealed by the occupation authorities on request from appropriate German authorities.

. . . . . "

Allied High Commission: Law No. 2
(14 Federal Register 7457)

Article 1

"In the absence of any indication to the contrary, in legislation of the Allied High Commission:

"1. The expression 'Occupation Authorities' shall include the Council of the Allied High Commission, the High Commissioners, and Allied Organizations and persons exercising power on their behalf.

"2. The expression 'Occupation Forces' shall include the Armed Forces of the Occupying Powers and auxiliary contingents of other Powers serving with them.

"3. The expression 'Allied Forces' shall include—

"(a) The Occupation Authorities.

"(b) The Occupation Forces and their members.

"(c) Non-German nationals, civilian or military, who are serving with the Occupation Authorities.

"(d) Members of the families and non-German persons in the service of the persons referred to in subparagraphs (a), (b) and (c) of this paragraph.

. . . . . .

"Done at Bonn, Petersberg, on 21 September 1949.

A. Francois-Poncet,
French High Commissioner for Germany,

John J. McCloy,
U. S. High Commissioner for Germany,

B. H. Robertson,
U. K. High Commissioner for Germany."

Allied High Commission: Law No. 3
(14 Federal Register 7458)

"

. . . . . .

"Article 5. References in any legislation enacted before the entry into force of the Occupation Statute to the Control Council, the Supreme Commander Allied Expeditionary Force, the Commanding General, the Armed Forces, Military Government, the Military Governor and to other authorities shall, where the context so requires or admits, be deemed to refer to the appropriate authorities exercising the particular functions mentioned in such legislation.

"Article 6. This law shall become effective on the 21st September 1949.

"Done at Bonn, Petersberg, on 21 September 1949.

A. Francois-Poncet,
French High Commissioner for Germany.

John J. McCloy,
U. S. High Commissioner for Germany.

B. H. Robertson,
U. K. High Commissioner for Germany."

Allied High Commission: Law No. 13
(15 Federal Register 1056)

Judicial Powers in the Reserved Fields

"The Council of the Allied High Commission enacts as follows:

"Article 1. Except when expressly authorized, either generally or in specific cases, by the High Commissioner of the Zone in which the Court is located, German Courts shall not exercise criminal jurisdiction:

"(a) (i) Over the Allied Forces;

. . . . . .

"Done at Bonn, Petersburg, on 25 November 1949.

B. H. Robertson,
U. K. High Commissioner for Germany.

A. Francois-Poncet,
French High Commissioner for Germany.

George P. Hays
for John J. McCloy,
U. S. High Commissioner for Germany."

U. S. High Commissioner: Law No. 1
(15 Federal Register 2086)

. . . . . .

"Article 1. Article 1 of the United States Military Government Ordinance No. 31, 'United States Military Government Courts for Germany', is hereby amended by changing the last sentence of said Article to read as follows:

" 'The Courts so created shall be known as the United States Courts of the Allied High Commission for Germany.'

. . . . . .

"This Law is applicable within the Leander of Bavaria, Bremen, Hesse, and Wuerttemberg-Baden and the United States Sector of Berlin. It shall become effective on January 1, 1950.

"Done at Frankfurt-on-Main, on December 28, 1949.

John J. McCloy,
United States High Commissioner for Germany."

COUNSELS' NOTE—All court papers printed herein were completely executed, whether or not herein so indicated. The copies furnished the printer were perforce office copies, without opportunity of completion from originals, which were in the hands of the Clerk of the Court of Appeals.

[fols. 115-117] PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6220

YVETTE J. MADSEN, Appellant,

versus

NINA KINSELLA, Warden of the U. S. Reformatory for Women, Appellee

Petition for Leave to Prosecute Appeal in Forma Pauperis and Order Granting Same—(Omitted in Printing)

[fol. 118] Order Extending Time to File Record on Appeal —(Omitted in Printing)

[fol. 119] Minute entries—(omitted in printing).

Order Permitting Appellee to File Brief in Excess of Fifty Printed Pages—(Omitted in Printing).

[fol. 120] Argument and Submission—(Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6220.

YVETTE J. MADSEN,
Appellant,

versus

NINA KINSELLA,
WARDEN OF THE U. S. REFORMATORY FOR WOMEN,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON.

(Argued March 12, 1951. Decided April 2, 1951.)

Before PARKER, SOPER and DOBIE, Circuit Judges.

Joseph S. Robinson (Dayton M. Harrington; James D. Graham, Jr.; Harrington & Graham; John C. Morrison, and Jackson, Kelly, Morrison & Moxley on brief) for Appellant, and John M. Raymond, Assistant Legal Adviser, Department of State, (A. Garnett Thompson, United States Attorney, and Joseph M. Sweeney, Assistant Legal Adviser, United States State Department, on brief) for Appellee.

PARKER, Circuit Judge:

This is an appeal from an order refusing to discharge appellant in a habeas corpus proceeding. Appellant was convicted of murdering her husband, an officer in the American Army, in the American Zone of Germany, by a trial court set up under the authority of the United States in the occupied territory. The conviction was affirmed but the sentence slightly modified by a reviewing court, similarly set up in the occupied territory under authority of the United States, and appellant was sent to the Federal Reformatory for Women at Alderson, West Virginia, for the service of the sentence imposed upon her. She sought release from this imprisonment by suing out a writ of habeas corpus; but her petition was denied by the District Judge in an able and comprehensive opinion which fully sets forth the facts of the case, the constitution of the occupation courts and the law under which appellant was convicted. See *Madsen* v. *Kinsella* 93 F. Supp. 319.

Little need be added here to what was said by the District Judge. There can be no question as to the power of the United States, as an incident of the occupation of Germany, to set up courts in the occupied territory and to give such courts jurisdiction over American nationals in the territory. "The establishment of such courts is but the exercise of the ordinary rights of conquest." *Mechanics etc. Bank* v. *Union Bank* 22 Wall. 276, 296. It is the duty of an occupying power to provide, as far as possible, for the security of persons and property and the administration of justice within the territory; and this is a military duty which devolves upon the President, as

commander in chief, who is entrusted as such with the direction of the military force by which the occupation is held. *Santiago* v. *Nogueras* 214 U.S. 260, 266; *The Grapeshot* 9 Wall. 129; *Leitensdorfer* v. *Webb* 20 How. 176; *Cross* v. *Harrison* 16 How. 164, 189.

We think it entirely immaterial that the President at the time of the trial of appellant was carrying on military government in the occupied zone of Germany through the state department instead of through the army and was using civilians instead of army personnel as judges of the courts. It was for the President, as commander in chief, to use such governmental department or agency as he thought proper in governing the conquered territory; and Congress in making appropriations to the army for the expenses of the occupation expressly authorized the President to transfer to other departments functions provided for under the appropriations. P.L. 327, 81st Cong. 63 Stat. 621. While military government, under that name, terminated September 21, 1949, the Office of the United States High Commissioner for Germany took over its functions and exercised the powers and authority of a "military" government, i.e. a government based on a military occupation. As stated in Winthrop, Military Law and Precedents, pp. 1246-1248:

> "The authority for military government is the fact of occupation * * *. There must be a full possession, a firm holding, a government de facto.
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> "Military government, thus founded, is an exercise of sovereignty, and as such dominates the country which is its theatre in all branches of administration. Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except

in so far as the same may be permitted by him to subsist. . . .

"The status of military government continues from the inception of the actual occupation till the invader is expelled by force of arms, or himself abandons his conquest, or till, under a treaty of peace, the country is restored to its original allegiance or becomes incorporated with the domain of the prevailing belligerent."

And we think it equally clear that the occupation courts had authority to try appellant for murder under the law of Germany. It is the general law that local criminal law in an occupied area continues to bind civilians unless changed by the occupying power. *Dow* v. *Johnson* 100 U.S. 158, 166; *Ketchem* v. *Buckley* 99 U.S. 188, 190. In addition to this, a proclamation of General Eisenhower of September 19, 1945, 12 Federal Register 6997, provided that German law should be applicable in the occupied territory until repealed or superseded by a new law enacted by the military government. German courts were forbidden to exercise jurisdiction in criminal cases involving wide classes of persons including not only the armed forces of the United Nations but also "any person serving with any such forces or a dependent accompanying any of them" or "any national of the United Nations" (12 Federal Register 2192); and military government courts were given jurisdiction of all offenses of civilians under the laws of the occupied territory. 12 Federal Register 2190. See *U.S. Military Government* v. *Ybarbo* 1 Court of Appeals Reports (Germany) 207.

Appellant's principal contention is that exclusive jurisdiction to try her for the crime of murder was vested in the courts martial of the army, under the 92nd Article of War, 10 USCA 1564, since she claims that she was a

person accompanying the army within the meaning of the 2nd Article of War, 10 USCA 1473. There is grave doubt whether a wife living with her officer husband is a person accompanying the army within the meaning of that article; but we need not go into the question, since we think it clear that, even if it be assumed that appellant occupied that status, the jurisdiction vested in courts martial over her was not exclusive and she was properly tried by the occupation court.

There can be no question but that prior to the 1916 amendments to the articles of war a military court, such as that by which appellant was tried, would have had jurisdiction to try her. *Neely* v. *Henkel* 180 U.S. 109; *Ex Parte Ortiz* 100 F. 955; *United States* v. *Reiter* Fed. Cas. No. 16,146. As said in the Digest of Opinions of the Judge Advocate General of the Army (1912) pp. 1066-7:

> "By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts martial, creatures as they are of statute, is restricted by law, and can not be extended to include certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders * * *. Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offenses, committed, (1) in the enemy's country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theater of war, in which martial law has been established by competent authority. The two classes of offenses are: I. Violations of the laws of war. II. Civil crimes, which, because the civil

authority is superseded by the military and the civil courts are closed or their functions suspended, can not be taken cognizance of by the ordinary tribunals. In other words, the military commission, besides exercising under the laws of war a jurisdiction of offenses peculiar to war, may act also as a substitute, for the time, for the regular criminal judicature of the State, or district."

Article 92 of the Articles of War was amended in 1916 to provide that any person subject to military law who commits murder shall suffer death or imprisonment for life as a court martial may direct; and Article 12 was amended to provide that courts martial should have "power to try any person subject to military law for any crime or offense made punishable by these articles." It was not provided, however, that the jurisdiction of the courts martial should be exclusive and the contrary was expressly provided by Article 15, which was new. That article provides, 10 USCA 1486:

"The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals."

The purpose of the section was explained before the Subcommittee on Military Affairs of the Senate by General Crowder in 1916 (see note 31, 327 U.S. 65) as follows:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court.

It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced * * *.

"It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient."

Referring to this section, the Supreme Court, speaking through Chief Justice Stone in *In re Yamishita* 327 U.S. 1, 7, said:

"Article 15 declares that the 'provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions * * * or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions * * * or other military tribunals.' See a similar provision of the Espionage Act of 1917, 50 U.S.C. sec. 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions 'any other person who by the law of war is subject to trial by military tribunals,' and who, under Article 12, may be tried by court-martial, or under Article 15 by military commission."

The precise question here involved was passed upon in

U. S. Military Government v. *Ybarbo, supra,* by the United States Court of Appeals in the occupation area. Chief Judge Clark, speaking for the court in that case, said:

> "The Military Government court in which the defendant has been tried seems to be clearly either a 'military commission' or another 'military tribunal'. Under the Common Law of War, Military Commissions (or as they are here called, Military Government Courts) had jurisdiction over soldiers and civilians. That jurisdiction was expressively saved to them by Article 15 of the Articles of War. The earliest commissions established by General Scott during the occupation of Mexico in 1847 exercised jurisdiction over all persons for civil crimes. During the civil war, prior to the passage of the Enrollment Act of 3 March 1863 such commissions functioned under the law of war and were convened as early as 1861. General McClellan at Yorktown ordered that 'acts commonly recognized as crimes against society by soldiers, officers and other persons connected with the Army' were 'punishable by a Court or Military Commission.' After the Enrollment Act of 1836 military commissions continued to exercise their common law jurisdiction. Winthrop cites many cases of soldiers and civilians who were tried by Military Commissions under the reconstruction acts.
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> "When Congress enacted the present Article of War 15, it would seem that it did so with the full knowledge that it was saving to Military Commissions the jurisdiction it had theretofore exercised over soldiers as well as civilians under the Law of War."

Coleman v. *Tennessee* 97 U.S. 509 and *Dow* v. *Johnson* 100 U.S. 158, upon which appellant relies, are not in point. They hold merely that courts martial of the army have exclusive jurisdiction to try members of the armed

forces for crimes alleged to have been committed by them while engaged in the occupation and that they are not subject to the laws or jurisdiction of the courts of the army. There is nothing in this to support the contention that civilians following the army may not be tried for offenses which they commit by military courts or commissions set up under the authority of the commander in chief.

Contention is made that the sentence of imprisonment was illegal; but the contention is entirely without merit. Defendant was guilty of a major crime, which under the law of Germany was punishable by death or imprisonment for life. She has no ground of complaint that the sentence of imprisonment was for only fifteen years or that it was in a penitentiary designated by the Attorney General pursuant to the judgment of the court. Confinement in a penitentiary in the United States of those convicted by military tribunals is expressly authorized by statute. 10 USCA 1452. In view of this, the distinction which appellant attempts to draw between confinement and imprisonment under German law has no relevance.

For the reasons stated, the judgment appealed from will be affirmed.

Affirmed.

[fol. 130] UNITED STATES COURT OF APPEALS

YVETTE J. MADSEN, Appellant,

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, Appellee

JUDGMENT—Filed April 2, 1951

Appeal From the United States District Court for the Southern District of West Virginia.

This Cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, [redacted], and the same is hereby, affirmed.

April 2, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

[fols. 131-132] IN THE SUPREME COURT OF THE UNITED STATES

Stipulation as to Printing Record—(Omitted in Printing)

[fol. 133] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 25, 1951

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 31st, 1951.

Fred M. Vinson, Chief Justice of the United States.

[fol. 135] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

ORDER ALLOWING CERTIORARI—November 5, 1951

On consideration of the motion for leave to proceed herein forma pauperis and of the petition for writ of certiorari it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 411.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.